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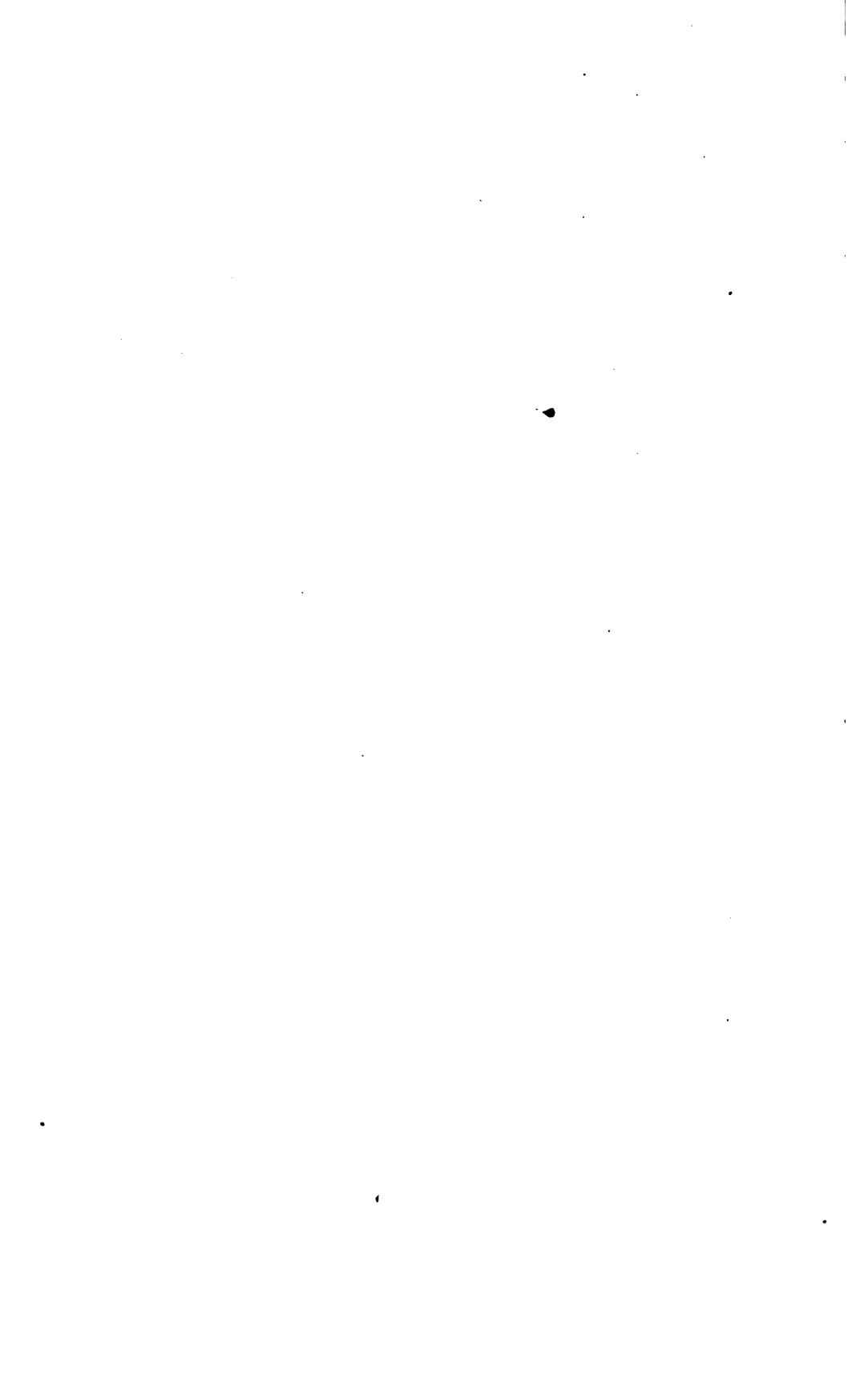
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677



REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

SIR FREDERICK POLLOCK, BART., LL.D.

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD

ASSISTED BY

R. CAMPBELL,

AND

OF LINCOLN'S INN, ESQ.



W. SANDERS,

OF THE INNER TEMPLE, ESQ.,

ASSISTANT READER IN EQUITY IN THE INNS OF COURT.

BARRISTERS-AT-LAW.

VOL. X.

1808—1809.

13 & 16 VESEY—10 & .11 EAST (to p. 435)—1 TAUNTON—
1 CAMPBELL

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PREFACE TO VOLUME X.

As we come down nearer to our own time, the proportion of notable and familiar decisions naturally increases, and only a few can be selected for notice.

Crawshay v. Collins (p. 61) can hardly be called a leading case, and in fact the actual decision is not now of much importance; but Lord Eldon's dicta contain some valuable expositions of general principles. *Higham v. Ridgway* (p. 235) is a well-known leading case in the law of evidence. *Butterfield v. Forrester* (p. 433) is the first of the modern line of cases on contributory negligence, and has been uniformly upheld in this country at any rate. *Chambers v. Donaldson* (p. 435) is a good example of the cases which young students may easily take for decisions on obsolete rules of pleading, whereas they decide material points of permanent law. The proposition that in trespass *qu. cl. fr.* an alleged command of the true owner, if pleaded in justification, is traversable, seems at first sight to depend on things which do not concern our generation. It really means that possession is a good title against every one who cannot show a better title of his own, which is a fundamental rule of law. *Daniels v. Davison* (p. 171) further illustrates the importance to purchasers of

making sure that the actual possession is in accordance with the title on which they rely. *Boydell v. Drummond* (p. 450) is a kind of leading case by courtesy, being current in text-books and often cited. It is by no means clear that the defendant's letter would not be held, if the case came into Court now, to be a sufficient note of the agreement.

Leck v. Maestaer (p. 660), with the reporter's note, shows how the instincts of good lawyers are often in advance of the reasons they can give. The case may be regarded, with Lord Campbell, as one of bailment; but it would now be more natural and more elegant to consider the dock-owner's duty as belonging to the class first established as a distinct species by *Indermaur v. Dames*, L. R. 1 C. P. 274, 2 C. P. 311, 35 L. J. C. P. 184, 36 L. J. C. P. 181. The fact that the duty may extend to strangers between whom and the owner of the building or structure there is no privity at all (*Heaven v. Pender*, 11 Q. B. Div. 503, 52 L. J. Q. B. 702) does not prevent it from existing side by side with relations of contract and the ordinary duties of diligence arising from them. In *Grant v. Gunner* (p. 562), a case of some importance for the direct protection of commoners and the indirect protection of open spaces, it will be observed that the commoner's right is established on the artificial supposition that it is in every case derived from an original grant by the lord.

Blewitt v. Marsden (p. 284) reveals a state of things

not easy for us to realise nowadays. There is a kind of grotesque heroism in the junior Bar amusing itself with putting sham pleas on the files of the Court while England was standing almost alone against the victor of Austerlitz.

At p. 615 we enter on Campbell's Reports, perhaps the best and most usually cited of all Nisi Prius Reports. The story, told by Lord Campbell himself, that he had a whole drawer full of Lord Ellenborough's bad law which he had suppressed, is well known.† Reporters have suffered themselves to be sadly shorn of this freedom in later times. I venture to believe, however, for reasons I have given in another work, that one case here reprinted from Campbell, *Baker v. Bolton* (p. 734), is wrong, and that in the case which, for the present, has confirmed it, *Osborn v. Gillett*, L. R. 8 Ex. 88, Baron Bramwell's dissenting judgment was right. *Roworth v. Wilkes* (p. 642) may still be found a profitable guide in the task of drawing the line between fair extracts and piracy so as to reconcile the just protection of copyright-owners with the reasonable use of copyright matter for purposes of information and criticism. In practice, the publicity of copious extracts is rather courted than not by most authors and by their publishers, except when their fame is so well established that no form of advertisement can make it sensibly greater.

The case of *Duke of Norfolk v. Worthy* (p. 749) owes its preservation to a recent judicial mention in the Court of Appeal (*Ellis v. Goulton*, '93, 1 Q. B. at p. 353). Lord

† See the Life of Lord Campbell, Lond. 1881, i. 215.

Justice Bowen cited the case only to illustrate the antiquity of a well settled rule; but we thought this enough to make us give it the benefit of any doubt. It may not be idle to point out that the Index to the last volume of the Law Reports completed at the date of correcting this page for the press ('93, 1 Ch.) shows ten cases to have been cited in Court from the volumes of Vesey so far covered by the Revised Reports. Every one of these cases is in the Revised Reports. Of Common-law cases within the same period mentioned in the same volume to have been cited, there are seven in all. Only one of these is not in the Revised Reports, and that one was cited in argument only for a dictum or rather an ornamental phrase. This seems to be fair, though rough, evidence that our estimate of practical utility has not been far wrong.

F. P.

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JUDGES

OF THE

HIGH COURT OF CHANCERY.

1808—1809.

LORD ELDON, 1807—1827	. . .	<i>Lord Chancellor.</i>
SIR WILLIAM GRANT, 1801—1818	. . .	}

COURT OF KING'S BENCH.

LORD ELLENBOROUGH, 1802—1818	. . .	<i>Chief Justice.</i>
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SIR SOULDEN LAWRENCE, 1794—1808	. . .	
SIR SIMON LE BLANC, 1799—1816	. . .	
SIR JOHN BAYLEY, 1808—1830	. . .	

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SIR ALAN CHAMBRE, 1800—1815	. . .	
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* Refused to be knighted.

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SIR GEORGE WOOD, 1807—1823 . . .)

15 & 16 V

SIR VICARY GIBBS, 1807—1812 . . . *Attorney-General.*

SIR THOMAS PLUMER, 1807—1812 . . . *Solicitor-General.*

LYSCOMB v.
Lekew (Doe
Atkinson v.
Attorney-G

BAINBRIDGE
Baker v. B
Barnwell v.
Bayley v. I
Beckwith v
Beeley v. V
Bengough
Blackenha
Blacksell (
Blewitt v.
Bond v. G
Bornmann
Boult (W)
Bourne v.
Bowcher v
Bowden v
Bowry v.
Bowaher
Bowyer (
Boydell v
Brock v.
Bromley
Brown v.
Brune (I
— (I
Burgess
Butterfi

CARR v.
Caswell

TABLE OF CASES

REPRINTED FROM

15 & 16 VESEY; 10 & 11 EAST (to p. 435); 1 TAUNTON;
1 CAMPBELL.

	PAGE
ANSCOMB <i>v.</i> Shore, 1 Camp. 285	686
Askew (<i>Doe d.</i>) <i>v.</i> Askew, 10 East, 520	366
Atkinson <i>v.</i> Ritchie, 10 East, 530	372
Attorney-General <i>v.</i> Nichol, 16 Ves. 338	186
BAINBRIDGE <i>v.</i> Neilson, 10 East, 329	316
Baker <i>v.</i> Bolton, 1 Camp. 493	734
Barnwell <i>v.</i> Harris, 1 Taunt. 430	560
Bayley <i>v.</i> Ballard, 1 Camp. 416	714
Beckwith <i>v.</i> Sydebotham, 1 Camp. 116	652
Beeley <i>v.</i> Wingfield, 11 East, 46	431
Bengough <i>v.</i> Walker, 15 Ves. 507	106
Blackenhagen <i>v.</i> The London Assurance Co., 1 Camp. 454	729
Blacksell (<i>Doe d.</i>) <i>v.</i> Tomkins, 11 East, 185	467
Blewitt <i>v.</i> Marsden, 10 East, 237	284
Bond <i>v.</i> Gibson, 1 Camp. 185	665
Bornmann <i>v.</i> Tooke, 1 Camp. 377	707
Boult (<i>Whiteacre d.</i>) <i>v.</i> Symonds, 10 East, 13	224
Bourne <i>v.</i> Taylor, 10 East, 189	267
Bowcher <i>v.</i> Noidstrom, 1 Taunt. 568	608
Bowden <i>v.</i> Vaughan, 10 East, 415	340
Bowry <i>v.</i> Bennet, 1 Camp. 348	697
Bowsher <i>v.</i> Calley, 1 Camp. 391, <i>n.</i>	711, <i>n.</i>
Bowyer (<i>Denne d.</i>) <i>v.</i> Judge, 11 East, 288	511
Boydell <i>v.</i> Drummond, 11 East, 142	450
Brock <i>v.</i> Kent, 1 Camp. 366, <i>n.</i>	706, <i>n.</i>
Bromley <i>v.</i> Hesselstine, 1 Camp. 75	635
Brown <i>v.</i> Tierney, 1 Taunt. 517	599
Brune (<i>Denn d.</i>) <i>v.</i> Rawlins, 10 East, 261	287
— (<i>Roe d.</i>) <i>v.</i> Prideaux, 10 East, 158	258
Burges <i>v.</i> Lamb, 16 Ves. 174	150
Butterfield <i>v.</i> Forrester, 11 East, 60	433
CARR <i>v.</i> Hood, 1 Camp. 355, <i>n.</i>	701, <i>n.</i>
Caswell <i>v.</i> Coare, 1 Taunt. 566	606

	PAGE
Chalmers v. Lanion, 1 Camp. 383	709
Chambers v. Donaldson, 11 East, 65	435
Champion v. Short, 1 Camp. 53	631
Church v. Brown, 15 Ves. 258	74
Churchill v. Evans, 1 Taunt. 529	600
Clarke v. Wilson, 15 Ves. 317	82
Coates v. Lewes, 1 Camp. 444	725
Cole v. Wade, 16 Ves. 27.	129
Coles v. Bell, 1 Camp. 478, n.	731, n.
Collins v. Plumb, 16 Ves. 454	214
Colsell v. Budd, 1 Camp. 27	621
Cormack v. Gladstone, 11 East, 347	518
Courteen v. Touse, 1 Camp. 43	627
Covell v. Laming, 1 Camp. 497	735
Cowell v. Simpson, 16 Ves. 275	181
Cox (Doe d.) v. Day, 10 East, 427	345
Crawshay v. Collins, 15 Ves. 218	61
Crockford v. Alexander, 15 Ves. 138	44
Crowder v. Shee, 1 Camp. 437	722
Curtis v. Daniel, 10 East, 273	291
 DANIEL v. Pitt, 1 Camp. 366, n.	 706, n.
Daniels v. Davison, 16 Ves. 249; 17 Ves. 433	171
Dawson v. Clarke, 15 Ves. 409	94
Day v. Merry, 16 Ves. 375	200
Delanoy v. Cannon, 10 East, 328	315
Denn d. Brune v. Rawlins, 10 East, 261	287
Denne d. Bowyer v. Judge, 11 East, 288	511
De Tastet v. Baring, 11 East, 265; 2 Camp. 65	499
Doe d. Askew v. Askew, 10 East, 520	366
— d. Blacksell v. Tomkins, 11 East, 185	467
— d. Cox v. Day, 10 East, 427	345
— d. Hardwicke v. Hardwicke, 10 East, 549	375
— d. Lawton v. Radcliffe, 10 East, 278	295
— d. Milner v. Brightwen, 10 East, 583	395
— d. Terry v. Collier, 11 East, 377	529
— d. Thorley v. Thorley, 10 East, 438	352
— d. Tofield v. Tofield, 11 East, 246	496
— d. Webber v. Lord George Thynne, 10 East, 206	280
Donaldson v. Thompson, 1 Camp. 429	717
Dring v. Dickenson, 11 East, 225	483
Dudley v. Smith, 1 Camp. 167	661
Dunman v. Bigg, 1 Camp. 269, n.	680, n.
 ECHLIFF v. Baldwin, 16 Ves. 267	 178
Edgar v. Bumstead, 1 Camp. 411	713
Elmore v. Stone, 1 Taunt. 458	578
Esdale v. Sowerby, 11 East, 114	440
Evans v. Peacock, 16 Ves. 512	218

	PAGE
FALCONER v. Hanson, 1 Camp. 171	663
Farnsworth v. Garrard, 1 Camp. 38	624
Favenc v. Bennett, 11 East, 36	425
Finch v. Finch, 15 Ves. 43	12
Fleming v. Simpson, 1 Camp. 40, n.	625, n.
Forster v. Christie, 11 East, 205	470
GALLWAY v. Mathew, 10 East, 264	289
Gaskell v. King, 11 East, 165	462
Goodland v. Blewith, 1 Camp. 477	731
Gordon v. Rimmington, 1 Camp. 123	656
Gosling v. Higgins, 1 Camp. 451	726
Graff v. Greffulhe, 1 Camp. 89	640
Grant v. Gunner, 1 Taunt. 435	562
—— v. Paxton, 1 Taunt. 463	583
Gregory v. Parker, 1 Camp. 394	712
HALL v. Odber, 11 East, 118	443
Hallifax v. Wilson, 16 Ves. 168	146
Harris v. Tremenheere, 15 Ves. 34	5
Hartley v. Rice, 10 East, 22	228
Havelock v. Geddes, 10 East, 555	380
Heatley v. Thomas, 15 Ves. 596	122
Herbert v. Champion, 1 Camp. 134	557
Hibbert v. Shee, 1 Camp. 113	649
Higginson v. Clowes, 15 Ves. 516	112
Higham v. Ridgway, 10 East, 109	235
Hill v. Smith, 10 East, 476; 4 Taunt. 520	357
Hodson v. Sharpe, 10 East, 350	324
Hotham v. Sutton, 15 Ves. 319	83
Hunter v. Prinsep, 10 East, 378	328
Hurry v. Mangles, 1 Camp. 452	727
Hurst v. Watkis, 1 Camp. 68	634
INNES v. Jackson, 16 Ves. 356	190
Irwin v. Dearman, 11 East, 23	423
Israel v. Israel, 1 Camp. 499	737
JACKSON v. Innes, 16 Ves. 356	190
Janson v. Brown, 1 Camp. 41	626
Jarratt v. Ward, 1 Camp. 263	677
Johnson v. Hudson, 11 East, 180	465
—— (Roe d.) v. Ireland, 11 East, 280	504
Jones v. Radford, 1 Camp. 83, n.	638, n.
KAYE v. Waghorn, 1 Taunt. 428	558
Kingston v. Knibbs, 1 Camp. 508, n.	742, n.
Knill v. Williams, 10 East, 431	349
Knox v. Wood, 1 Camp. 543	746
Kymer v. Suwercropp, 1 Camp. 109	646

	PAGE
LAW <i>v.</i> Hodson, 11 East, 300; 2 Camp. 147	513
Lawton (<i>Doe d.</i>) <i>v.</i> Radcliffe, 10 East, 278	295
Leck <i>v.</i> Maestaer, 1 Camp. 138	660
Leigh <i>v.</i> Leigh, 15 Ves. 92	31
Lester <i>v.</i> Garland, 15 Ves. 248	68
Lethbridge <i>v.</i> Winter, 1 Camp. 263, <i>n.</i>	676, <i>n.</i>
Liddard <i>v.</i> Lopes, 10 East, 526	368
London (Mayor of) <i>v.</i> Long, 1 Camp. 22	618
Lupton <i>v.</i> White, 15 Ves. 432	94
M'DOUGALL <i>v.</i> Claridge, 1 Camp. 267	679
Mackreth <i>v.</i> Symmons, 15 Ves. 329	85
Milner (<i>Doe d.</i>) <i>v.</i> Brightwen, 10 East, 583	395
Morris <i>v.</i> Burdett, 1 Camp. 218	667
Mowbray <i>v.</i> Fleming, 11 East, 285	508
NORFOLK (Duke of) <i>v.</i> Worthy, 1 Camp. 337	749
North <i>v.</i> Miles, 1 Camp. 389	710
OLIVER <i>v.</i> Collings, 11 East, 367	525
O'Mealey <i>v.</i> Wilson, 1 Camp. 482	732
Ougier <i>v.</i> Jennings, 1 Camp. 505, <i>n.</i>	739, <i>n.</i>
PARKER <i>v.</i> Staniland, 11 East, 362	521
Parkin <i>v.</i> Tunno, 11 East, 22; 2 Camp. 59	422
Peacock <i>v.</i> Evans, 16 Ves. 512	218
—— <i>v.</i> Harris, 10 East, 104	231
—— <i>v.</i> Peacock, 16 Ves. 49	138
Pearsall <i>v.</i> Simpson, 15 Ves. 29	1
Phillimore <i>v.</i> Barry, 1 Camp. 513	742
Pipon <i>v.</i> Cope, 1 Camp. 434	720
Pool <i>v.</i> Bousfield, 1 Camp. 55	633
Porthouse <i>v.</i> Parker, 1 Camp. 82	637
Priestly <i>v.</i> Hughes, 11 East, 1	406
Puller <i>v.</i> Staniforth, 11 East, 232	486
REID <i>v.</i> Darby, 10 East, 143	246
Rex <i>v.</i> Ball, 1 Camp. 324	695
—— <i>v.</i> Bampton (Inhabitants of), 10 East, 282	299
—— <i>v.</i> Bridekirk (Inhabitants of), 11 East, 304	514
—— <i>v.</i> Cornforth, 11 East, 9, <i>n.</i>	412, <i>n.</i>
—— <i>v.</i> Kea (Inhabitants of), 11 East, 132	448
—— <i>v.</i> Kent (Justices of), 11 East, 229	484
—— <i>v.</i> Lloyd, 1 Camp. 260	674
—— <i>v.</i> Lucas, 10 East, 235	283
—— <i>v.</i> Teal, 11 East, 307	516
—— <i>v.</i> White, 1 Camp. 359, <i>n.</i>	705, <i>n.</i>
Ritchie <i>v.</i> Atkinson, 10 East, 295	307
Roberts <i>v.</i> Karr, 1 Taunt. 495	592
——, 1 Camp. 262, <i>n.</i>	676, <i>n.</i>

	PAGE
Robinson v. Cleator, 15 Ves. 526	118
Roe d. Brune v. Prideaux, 10 East, 158	258
— d. Johnson v. Ireland, 11 East, 280	504
Rogers v. Allen, 1 Camp. 309	689
Routh v. Thompson, 11 East, 428; 13 East, 274	539, 645
Roworth v. Wilkes, 1 Camp. 94	642
Rugby Charity v. Merryweather, 11 East, 375, n.	528
Rugg v. Minett, 11 East, 210	475
 SADLER and Jackson, <i>Ex parte</i> , 15 Ves. 52	18
St. Paul v. Lord Dudley, 15 Ves. 167	57
Seaman v. Vawdrey, 16 Ves. 390	207
Shepherd v. Chewter, 1 Camp. 274	681
Shirt v. Westby, 16 Ves. 393	210
Simpson, <i>Ex parte</i> , 15 Ves. 476	104
Smith v. Goss, 1 Camp. 282	684
Soane v. Ireland, 10 East, 259	285
Somerville v. Mackay, 16 Ves. 382	200
Splidt v. Bowles, 10 East, 279	296
Stamford Friendly Society, <i>Ex parte</i> , 15 Ves. 280	78
Stapylton v. Scott, 16 Ves. 272	179
Steel v. Campbell, 1 Taunt. 424	557
Sterling, <i>Ex parte</i> , 16 Ves. 258	177
Stevens v. Bagwell, 15 Ves. 139	46
 TABART v. Tipper, 1 Camp. 350	698
Terry (Doe d.) v. Collier, 11 East, 377	529
Thomas v. Evans, 10 East, 101	229
Thomason v. Frere, 10 East, 418	341
Thompson v. Havelock, 1 Camp. 527	744
Thorley (Doe d.) v. Thorley, 10 East, 438	352
Tinson v. Francis, 1 Camp. 19	617
Tofield (Doe d.) v. Tofield, 11 East, 246	496
Topham v. Braddick, 1 Taunt. 572	610
Toulmin v. Inglis, 1 Camp. 421	715
Twort v. Twort, 16 Ves. 128	141
 URQUHART v. Barnard, 1 Taunt. 450	574
 VALLANCE v. Dewar, 1 Camp. 503	738
Vincent v. Horlock, 1 Camp. 442	724
 WAITHMAN v. Wakefield, 1 Camp. 120	654
Waldo v. Caley, 16 Ves. 206	165
Walker v. Shore, 15 Ves. 122	41
Wall v. Tomlinson, 16 Ves. 413	212
Wallace v. Hardacre, 1 Camp. 45	629
Ward v. Hepple, 15 Ves. 297	80
— v. Wells, 1 Taunt. 461	581
Waring v. Favenck, 1 Camp. 85	638

	PAGE
Washborn <i>v.</i> Black, 11 East, 405, <i>n.</i>	538, <i>n.</i>
Waters <i>v.</i> Taylor, 15 Ves. 10	1
Webber (<i>Doe d.</i>) <i>v.</i> Lord George Thynne, 10 East, 206	280
Wedderburn <i>v.</i> Bell, 1 Camp. 1	615
Whatley <i>v.</i> Tricker, 1 Camp. 35	623
White <i>v.</i> Lupton, 15 Ves. 432	94
Whiteacre <i>d.</i> Boulton <i>v.</i> Symonds, 10 East, 13	224
Wight <i>v.</i> Leigh, 15 Ves. 564	120
Williams <i>v.</i> Innes, 1 Camp. 364	702
Wiltshire <i>v.</i> Sims, 1 Camp. 258	673
Winter <i>v.</i> Miles, 10 East, 578; 1 Camp. 475, <i>n.</i>	391
Winterbourne <i>v.</i> Morgan, 11 East, 395	532
Woodman <i>v.</i> Chapman, 1 Camp. 189	666
Wright <i>v.</i> Smythies, 10 East, 409	337
—— <i>v.</i> Wright, 16 Ves. 188	161
YALLOP, <i>Ex parte</i> , 15 Ves. 60	24

STOUGHTON v. LEIGH, 1 Taunt. 402.

This case, relating to dower in mines, is practically almost obsolete for English purposes. But on the suggestion of some of our learned friends, and also having regard to the requirements of those American States where the learning of dower is still practical, the report will be reprinted in Vol. XI. of the Revised Reports.

The Revised Reports.

VOL. X.

CHANCERY.

WATERS *v.* TAYLOR.

(15 Vesey, 10—29.)

Partnership disputes. Alleged misconduct of managing partner.
Motion for the appointment of a manager refused.

1807.
Nov. 19, 20.

1808.
Feb. 12.
March 5, 21.

ELDON, L.C.

[10—29]

A NOTE of this report will be contained in a later volume of the Revised Reports, together with the report of the hearing of the cause taken from 2 V. & B. 299.

PEARSALL *v.* SIMPSON.†

(15 Vesey, 29—33.)

Legacy in trust to pay the interest to the separate use of A. for life; and, after her decease, as to the capital for her children: if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons.

Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established.

1808.
March 23.
Rolls Court.
GRANT, M.R.

[29]

ELIZABETH FARNELL by her will gave to trustees the sum of 400*l.*; in trust to continue or place the same at interest on Government or real security; and to pay the interest and produce to her sister Mary Stafford during her natural life, for her separate use; and after her decease in trust to pay such interest and produce to her sister Martha Farnell, during her natural

† *Taylor v. Lambert* (1876) 2 Ch. D. 177, 45 L. J. Ch. 418, 34 L. T. N. S. 567.

PEARSALL
c.
SIMPSON.

[*30]

life, for her separate use ; and after the decease of both sisters in trust to pay and divide the said principal sum or what shall remain thereof unto and equally amongst all such *children of Mary Stafford, as shall be then living ; and, if there shall be but one such child, then in trust to pay the same unto such only child ; such principal sum or the shares to be paid to such child or children, when and as soon as he, she, or they, shall respectively attain the age of twenty-one ; and the interest in the mean time to be applied for his, her, or their, benefit, as the trustees shall judge best ; and, in case there shall be no child of Mary Stafford, who shall survive both the testatrix's said sisters, and attain twenty-one, then to pay, &c. the said principal, &c. to and among such children or child of Martha, as shall survive both the testatrix's said sisters, &c. in the same manner ; and, in case there shall be no child of either of her said sisters, who shall survive them, and attain twenty-one, then in trust from and after the death of both her said sisters and their children if any to pay the interest of the said principal sum or what shall then remain thereof to her brother-in-law Richard Stafford during his natural life ; and from and after his decease in case he shall become entitled to such interest then in trust to pay and divide one half of the said principal sum or what shall then remain thereof unto and equally amongst all her (the testatrix's) first cousins on her father's side, who shall be then living, and the children of such first cousins as shall be dead : the children to take only their parent's share ; as if the parent was living ; and the other half unto and equally amongst all her first cousins on her mother's side, who shall be then living, and the children of such first cousins, who shall be dead : the children to take only their parent's share ; as if the parent was living. A power was given to the trustees to advance part or the whole principal to the sisters of the testatrix, if reduced in circumstances ; to make a comfortable income.

[*31]

The testatrix then gave another sum of 400*l.* upon *similar trusts for her sisters and their children ; with this difference only, that Martha Farnell and her children were to have priority ; and, in case there shall be no child of either, &c. then in trust from and after the death of both her said sisters and their

children, if any, to pay the interest to the person, who shall happen to be the husband of Martha at the time of her decease, during his natural life; and from and after his decease in case he shall become entitled to such interest then in trust to pay and divide the principal in like manner as the first mentioned sum of 400*l.*, subject to the same deduction; in case his sisters, or either of them, shall be in reduced circumstances.

PEARSALL
v.
SIMPSON.

The testatrix then gave to the same trustees the farther sum of 650*l.*; in trust to pay the interest to her sister Martha Farnell, until she shall marry, and in case of any loss in her fortune to make it good; and, in case her said sister Martha shall happen to marry, or to depart this life unmarried, then from and after such marriage or death in trust to divide the said sum of 650*l.* or what shall remain thereof into thirteen parts; and of seven of such parts to apply as well the interest as principal in the same manner, as directed touching the first sum of 400*l.*: four other parts, as directed touching the second sum of 400*l.*; and, as to the other two parts, to pay the interest to Martha for life for her own use, as aforesaid; and the principal after her death to Martha Gifford; and, after some legacies, she gave the residue of her estate and effects, real, personal, and mixt, to Martha Farnell, her heirs, executors, &c. and appointed her sole executrix.

The testatrix died in 1775. Martha Farnell afterwards married Peter Eaton; who died in 1785; and she died on the 10th of December, 1791, without leaving issue. *Richard Stafford died in October, 1791; and his widow Mary Stafford died in 1807, without leaving issue.

[*32]

The plaintiffs were the children of John Pearsall, deceased, one of the first cousins of the testatrix on the father's side; claiming, with the defendant Mary Simpson, the only surviving first cousin of the testatrix, one moiety of the several funds of 400*l.* and 400*l.* and eleven thirteenth parts of the 650*l.*, to be divided in equal moieties between the plaintiffs and the defendant Mary Simpson; and praying accordingly: the other defendant, the personal representative of Martha Eaton, insisting, that the trusts of the will concerning the said funds in favour of the first cousins of the testatrix and their children were contingent; and depended upon the events of the husbands of Martha Eaton and Mary Stafford,

PEARSALL
v.
SIMPSON.

respectively, becoming entitled to the interest; and, as neither of them became so entitled, the funds upon the respective deaths of Martha Eaton and Mary Stafford without issue sunk into the residue.

Mr. Hart, and *Mr. Wear*, for the plaintiffs: *Mr. Roupell*, for the defendant Mary Simpson.

Mr. Cooke, and *Mr. Buller*, for the representative of the residuary legatee, contended, that the event, upon which alone the legacies were given over, had not happened: the husbands of Mary Stafford and Martha Eaton never having become entitled to the interest. They cited *Doo v. Brabant*,† *Calthorpe v. Gough*,‡ *Denn v. Bagshaw*;§ as authorities, that the intention, though apparent, if not sufficiently expressed, cannot be executed.

The reply was stopped by the Court.

[33] THE MASTER OF THE ROLLS :

The only question is, whether Richard Stafford's taking for life was a condition precedent to the cousins of the testatrix taking the capital. That would be a most absurd condition undoubtedly; for there is no sense or reason, making the right of her first cousins depend upon a fact, totally unconnected with any intention as to them. What was it to them, whether Richard Stafford took, or not. Such a construction is not to be made; unless absolutely necessary. It is very different from the case, put by *Mr. Cooke*: a case of direct condition; that if A. lives to a particular period, he shall take: otherwise he shall not. It was doubtful, whether Richard Stafford would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects, that he may not live to take the interest: but, if he does, she makes his death the period, at which her first cousins are to take. It is, not a condition precedent, but fixing the period, at which the legatees over shall take; if he ever takes. The words will bear that construction; and the reason of the thing seems to require it.

The decree was made accordingly.

† 3 Br. C. C. 393. ‡ 3 Br. C. C. 395, n. § 3 R. R. 242 (6 T. R. 512).

HARRIS *v.* TREMENHEERE.†

(15 Vesey, 34—42.)

1808.

March 12, 18,
19.

ELDON, L. C.

[34]

Bill to set aside leases, obtained by an agent and attorney from his principal, dismissed as to voluntary leases; being pure gift; and no fraud or misrepresentation, or other unfair conduct; with costs as to some, intended as a provision upon, and inducement to, the marriage of the defendant: without costs as to others: the relation of the parties and the circumstances upon general principles of public policy and utility justifying inquiry.

Another lease decreed to be delivered up: the verdict in an issue establishing, that a full consideration was not paid.

THE bill in this cause, filed by the widow and children of William Harris, entitled as devisees of his freehold estates in the counties of Devon and Cornwall by his will, dated the 11th of November, 1797, prayed, that several leases, obtained by the defendant from the deviser, should be set aside.

The circumstances, under which this relief was sought, as represented by the bill, were these. The testator, being in a great degree unacquainted with business, and violently afflicted with the gout, so as to render him incapable of attending to his affairs, the defendant, an attorney of Penzance, taking advantage of those circumstances, prevailed upon the testator to appoint him to the stewardship and general management of his affairs. Previously to the year 1794 the defendant had obtained great influence over him; and by means of that influence induced him to grant the following leases, which were the subject of this suit:

A lease of premises, called Blake's tenement; for ninety-nine years, determinable upon the death of a lady, whom the defendant afterwards married; and another lease, to commence upon the death of a person, still living, at the rent of 11*s.* A lease of another tenement, dated the 7th of July, 1794, for ninety-three years; determinable upon the death of Mrs. Tremeneheere: to commence upon the death of a person, since deceased: at the rent of 2*l.* 2*s.* A lease of a tenement, called *Palmer's tenement, dated the 4th of August, 1795; in consideration of 150*l.*; expectant upon the determination of a life of seventy, for ninety-nine

[*35]

† *Morgan v. Minett* (1877) 6 Ch. D. 638, 36 L. T. N. S. 948.

HARRIS
TREMEN-
HEIRE.

years, determinable upon three lives, at the rent of 1*l.* 1*s.* Another lease was dated the 27th of April, 1795, for ninety-nine years; determinable upon the deaths of the defendant and his wife; with a power to the defendant to name any one of their children as another life: at the rent of 1*l.* 1*s.* Another lease, dated the 27th of November, 1797, for ninety-nine years: to commence upon the death of two persons, still living, at the rent of 2*s.* The bill charged, that the consideration of 150*l.* for the lease of Palmer's tenement was not paid.

The defendant by his answer represented, that a great friendship subsisted between him and the testator; having been long known to each other; and being related: the father of the defendant and the testator's grandfather having been first cousins. The defendant also stated, that he had rendered great services to the testator by reconciling him to his father; who by the defendant's interference paid his son's debts; and redeemed annuities, which he had granted. The testator expressed his obligations to the defendant; declaring, that he considered himself indebted to him for great part of his estate; and desiring the defendant to continue to act as his steward; as he had acted for the testator's father.

[*36]

The answer further stated, that the defendant, being about to marry, and wishing to make a settlement, proposed to purchase from the testator a reversionary interest in certain premises; offering to pay a fair consideration. The defendant offered him those premises, and any others he might wish to settle; declaring, that he would take no consideration, but only a small acknowledgment yearly; expressing the strongest wishes for the defendant's happiness, &c. and desiring him to get the leases drawn. The leases of 1795 were a voluntary offer of the testator upon receiving a considerable accession of fortune; in order to give the defendant a present benefit: the other leases being reversionary; and to insert his wife and child. The defendant in the same year proposed to purchase Palmer's tenement: the life upon it then being seventy years old. The defendant had it valued; and paid the amount of the valuation, 150*l.* by giving the testator credit in account, and paying the balance. The defendant never applied to the testator to make such leases; but

upon being pressed by him to receive some farther benefit, said, if the testator would grant him the waste of Planning, he might build a house; and the testator directed him to get the lease prepared. The will contained a direction to the testator's son to continue the defendant as steward; calling him his friend, &c. The defendant admitted, that the leases were prepared in his office.

HARRIS
v.
TREMEN-
HEERE.

Sir Samuel Romilly and *Mr. Wetherell*, for the plaintiffs, contended, as to the purchase, that a steward, taking from his employer a purchase, for a consideration merely nominal, is bound to shew, that he represented to his principal that he was making, not a sale, but a mere gift; and as to that, which must be considered gratuitous, that it was not competent to a steward, having the management of the property, to accept a donation from his principal at that time: if, when all accounts have been settled, and the relation has ceased, the principal thinks proper to reward his services, he may: but a transaction of bounty between such parties, while the relation subsists, and the accounts are unsettled, cannot stand. They relied, farther, upon the particular circumstances: the incapacity and embarrassments of the testator; those circumstances well known to the defendant; who was employed by the *testator, not only as steward, but generally in his affairs, as his attorney.

[*37]

Mr. Martin and *Mr. Bell*, for the defendant, insisted, that there was no instance of setting aside such transactions by a person, fully apprised of his own situation; and acting deliberately under the sense of great obligations, incurred in the management of his affairs; that there was no more equity for setting aside leases, than for getting back a pecuniary payment, made upon such a consideration, and under similar circumstances; in either case, the party being competent to do the act, it can only be effected by direct fraud, or undue influence: as a general proposition, it is not true, that a principal cannot make a gift to an agent, while the relation subsists; and in this instance the motive was, not only the regard, proceeding from friendship, and the consideration of

HARRIS
v.
TREMEN-
HEERE.

service, in the actual sense, but also obligations of a very special and important nature.

Sir Samuel Romilly, in reply :

It is not necessary upon all the circumstances of this case to maintain, that a person, sustaining the character of this defendant, could not take a gift from his principal : but it is incumbent upon such a person to make out by evidence, that his principal knew what he did ; that some third person was consulted ; and that a distinct representation was made to him as to the value of the property he was going to convey. The defendant is not prepared with such evidence ; and all the circumstances, the state of the testator, both as to his health and his embarrassments, and the situation of the defendant, having the management of his property and the general conduct of his affairs, the lease of Palmer's tenement, considered as a purchase, the reversionary lease upon a *life, about seventy, contrary to his former resolution not to grant another reversionary lease, where only one life was existing, and that life above the age of sixty, involves these transactions in suspicion.

[*38]

THE LORD CHANCELLOR :

Having an extremely clear opinion upon this case, I shall not defer my judgment. The bill impeaches these several leases ; obtained from the testator, under whom the plaintiffs claim, by the defendant ; some for his own benefit : others for the benefit of some of his family ; admitting other considerations than those involved in the mere relation of principal and agent. The defendant however stood in the character of agent and attorney to this gentleman ; and in that character must be bound by a due application of all the principles of this Court, which upon grounds of public policy affect that relation. The defendant, being the steward, agent, and attorney, of the testator, at the same time stood in a relation to him, that furnished considerations of kindness, as well as justice.

The real object of the testator in some of these leases was to make a provision for the lady, whom the defendant afterwards married. As to the delicacy of the transaction, courts of justice

HARRIS
v.
TREMEN-
HEERE.

have nothing to do with those considerations of imperfect obligation. A letter from the defendant, proposing to become the purchaser of two of these tenements for the life of that lady, is in evidence. At that time the testator was so much indisposed with the gout as to be unable to answer it: but afterwards he sent to the defendant a letter, which, unless I regard it with a jealousy, that would be inconsistent with the safety of mankind, shews, he was aware, that it was a proposal of purchase; and is evidence of his friendship for the defendant. In strong language he vows, that *he will take no consideration. I have no jurisdiction, authorizing me to set aside such a transaction; to hold, that under those circumstances, if he thought proper, he should not make such a disposition as this; simply for the life of that lady, individually; and intended as a provision for her. It is not necessary therefore to enter into the consideration of the principles, that determined the case of *Huguenin v. Baseley*.† As to the interest of the defendant, it is very difficult to maintain, that it could be affected, if the interests of his wife could not: that letter being an authority to the husband to hold out to her, that such were to be his situation and circumstances. Her interest would be affected by depriving him of that benefit, for which she contracted; and which she was induced to believe he would have. As to those leases therefore the bill must be dismissed with costs.

[*39]

The consideration as to the other voluntary leases stands upon different principles; as they are pure gift; not connected with the proposed change of the defendant's situation; as affecting the situation of a third person. With regard to those leases, I am not entrusted with a jurisdiction to say, what a delicate, or a prudent, consideration would have suggested: but upon reasons of public policy, though I must dismiss the bill as to those two leases also, I shall dismiss it as to them without costs. I cannot find any decision, authorizing me to say, that the defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or the evidence the slightest hint, that the defendant laid before the testator any account of the value of the

† 9 R. R. 276 (14 Ves. 273).

HARRIS
 v.
 TREMEN-
 HEERE.
 [*40]

premises, that was not perfectly accurate, that would induce me to set *them aside, whatever the parties intend, upon the general ground, that the principal never would be safe, if the agent could take a gift from him upon a representation, that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration, that should have been given, if it had been the subject of barter. But, where a person in that situation takes leases without calling in third persons, a suspicion attaches upon the transaction; and justifies the examination; and this Court never ought to give costs upon the result of that examination, where the party has not interposed any other person. As to those two leases therefore the bill must be dismissed without costs.

The premises, described as Palmer's tenement, fall under a perfectly different consideration. Upon general principles I cannot according to the evidence now before me dismiss the bill as to that part of the case. This is a lease, granted, not gratuitously, but for consideration: granted upon the proposition of the defendant; and it is a lease for three lives, expectant upon the decease of a person at the age of seventy. This lease was taken, when it was clearly understood between them, upon the determination of the defendant himself, bound by his duty to consult the interest of his employer, and not hastily to depart from the general principle, which had governed him, that it was not for the interest of the testator to grant any reversionary lease upon one life: that life being above the age of sixty. The defendant is in this situation; being the person, who is to acquire the interest, and also the person, who ought to advise the grantor, he imposed upon himself the duty of informing

[*41]

*himself fully of the value, and of acting in favour of his employer as adversely against himself, as he would against any other person, with whom, acting fairly for his employer, he was making the best bargain he possibly could. The Court expects that from him under such circumstances. When he became the purchaser in such a transaction, the circumstance,

that he was the attorney, who carried it into execution, was as improvident a measure as a man of prudence and respect could take; though the result may be the same, as if other persons had been employed; as, whenever these circumstances concur, the Court is bound upon principles of public utility and public policy to search the transaction to the bottom.

HARRIS
v.
TREMEN-
HEERE.

The statement by the answer, that this lease was granted in consideration of 150*l.*, for three lives, all very young, cannot have any effect; when I am uninformed as to the capacity of improvement, and other circumstances, which the duty of the defendant, acting as a steward, required him to attend to. The consideration expressed, if paid down at the time, may be nothing like the actual consideration; depending upon the comparative value of the life, on which the premises were held, and of the other lives. I will not examine, whether the consideration was, or was not, paid down; though the time of payment is of the very essence; where the subject is a reversionary lease. I must come to the same conclusion, as if the money had been paid in 1795. First, there is not sufficient evidence, that this was a proper bargain; and that is not to be presumed. Evidence might have been given upon the comparative yearly value of the premises at the time; or, that repairs were wanting: but there is no such evidence. There appears also to have been a habit of calculation as to value in these manors: it is said fourteen years is the rate of purchase; and there must have been a rate of purchase: otherwise they could not have *come to the resolution not to grant reversionary leases upon a life of the age of sixty. With regard to this there is no evidence on the part of the defendant; there is evidence for the plaintiffs: evidence, which, though far from precise certainly, makes a strong impression on my mind.

[*42]

With regard to this lease therefore, considered as a lease which an agent, steward, and attorney, took from his client, master, and employer, in the grant of which, as being made upon a proposition of purchase, this Court cannot permit any motive of kindness and gratuity to be mixed, upon principles of public utility and public policy, if any doubt is raised, the defendant must be required to shew, that he made as good a

HARRIS
T. TREMEN-
HEERE.

bargain for his employer, as against himself, as a provident, well-managing, honourable, steward, acting most adversely, in a fair sense, would; that he paid the full amount, that he could have obtained from any other person. The evidence upon that has not satisfied me. Therefore either an inquiry or an issue must be directed, upon the question, whether 150*l.* was the full consideration for the interest, granted by that reversionary lease.

By the decree the bill was accordingly dismissed, with costs as to some of the voluntary leases; and without costs as to the others; and as to the lease of the 4th of August, 1795, of Palmer's tenement, an issue was directed upon the question, whether the 150*l.* paid by the defendant was, or was not a full consideration. The verdict upon the trial being, that it was not a full consideration, a decree was afterwards made; directing that lease to be delivered up.

FINCH *v.* FINCH.

(15 Vesey, 43—52.)

1808.
March 21.

ELDON, L.C.

[43]

Purchase in the name of another a trust for the party, who pays the consideration; except by a parent in the name of his child; which is presumed an advancement.

The presumption capable of being rebutted; but does not give way to slight circumstances.

At a court baron, held for the manor of Ramsbury, on the 30th of October, 1776, John Finch the elder, being seised of copyhold premises within the manor, for the life of John Green, the plaintiff John Finch the younger, nephew of John Finch the elder, took of the lord, according to the custom; to hold in reversion from and immediately after the death of Green, or the surrender, forfeiture or other sooner determination of the estate and interest in the premises, held for the life of Green, unto John Finch, then of the age of three years, and William Finch, then of the age of two years, sons of John Finch, the nephew, for and during the term of their natural lives and the life of the longer liver of them successively at the will of the lord according

FINCH
v.
FINCH.

to the custom of the manor ; and for such estate so to be had in the premises, the plaintiff, who was, and is therein described as the sole purchaser thereof, gave to the lord a fine of 250*l.* : but the admission and fealty of John and William Finch, the sons of the plaintiff, was respited.

John Finch, the plaintiff's uncle, died in 1782 ; having by his will, dated the 8th of November, 1776, given his copyhold and leasehold estates to the plaintiff ; and appointed him executor. The plaintiff upon the death of his uncle entered upon the copyhold estates ; and at a court baron, held upon the 22nd of October, 1790, it was presented, that Green had died ; that upon his death a heriot became due ; and that the plaintiff, the purchaser of the said premises in reversion, and who was in possession of the said premises at the time of the death *of John Green, came into Court ; and compounded for the heriot ; and John Finch (his son) then a minor, came into Court ; and prayed to be admitted tenant by the plaintiff, his father and natural guardian ; and was admitted according to the custom.

[*44]

The plaintiff's son having brought an ejectment, the bill was filed ; praying a declaration of the plaintiff's title and to the copyhold estates for the lives of the defendants, his sons ; that the legal estate may be declared to be held by the defendant John Finch in trust for the plaintiff, his executors, &c. ; that the defendants may surrender, or hold, accordingly ; and *an injunction.

A motion was made to dissolve the injunction ; upon the answer of John Finch ; insisting, that a purchase by the father in the name of his son was to be considered as an advancement.

Mr. Leach, and *Mr. Wingfield*, shewed cause against dissolving the injunction :

The questions are, first, whether there is a *primâ facie* title in the son ; rebutting the resulting trust from the admission of the father, as the purchaser : secondly, if the son has a title *primâ facie*, sufficient for that effect, whether the injunction should be dissolved without giving an opportunity to the plaintiff to go into evidence to repel that title. The cases upon

FINCH
v.
FINCH.

claims by way of advancement, are, either where the purchase was immediately in the name of the son; or, the father being first named, the son's name was introduced as to take in succession after him. This is a claim to take in succession upon the death, not of the father of the claimant, but of a stranger. A purchase being taken in the name of the son of the purchaser, no reason appearing for not *taking it in his own name, there is a ground for supposing an intention of advancement: so, where the sons are to take in succession after the life of the father, that, being the natural course of devolution, affords a strong inference of an intended provision: yet even in that case a distinction was taken; which has been but lately over-ruled. In the case of *Dickinson v. Shaw* † the Lords Commissioners held, that there was no *primâ facie* title in the children; as, the custom being to take for three lives,‡ the father might consistently with the intention to take the whole interest name his sons as the two other lives; and that circumstance therefore did not afford a presumption, that would repel the resulting trust for the father. That case was however over-ruled by *Dyer v. Dyer*; § Lord Chief Baron EYRE deciding, that, where the sons were named to take in succession after the father, that was *primâ facie* an advancement: so as to throw the proof upon the other side.

This plaintiff at the time of his purchase had no interest: the interest being in his uncle; who by his will, made only eight days afterwards, which may be considered part of the same transaction, gave the interest he had to his nephew. This is therefore distinguished from the other cases in this respect; that it is not a purchase in the name of a child alone. It is not necessary to maintain, that a father can never be intended to purchase a reversion for his child. This is not a purchase of a dry reversion: nor is it a purchase to take *effect after the death of the father: but it is to be considered a purchase by the father for the life of Green; and a provision, if so intended, to take effect after the death of Green: his age not appearing

† In Chancery, 22nd May, 1770. Stated 1 Watkins on Copyholds, 222.

‡ In the report of this case, 1 Watkins on Copyholds (see page 222)

Lord Chief Baron EYRE says, there was no custom stated.

§ 2 R. R. 14 (2 Cox, 92).

[*45]

[*46]

FINCH
v.
FINCH.

farther than that he had been fifty-eight years tenant of this copyhold estate. Can the father be supposed to intend, for the purpose of making a provision for these two children, to divest himself of the possession and enjoyment of his own estate upon the death of a stranger, wholly unconnected with the family, with whom therefore these children had no connection; from whom they could expect no bounty: the children being so young, that the death of that person might be expected, before they could want provision? The language of the copy itself supports the inference, that the father intended to purchase for his own benefit and enjoyment; not for the purpose of advancement. So, the presentment in October, 1790, upon the death of Green, seems by its language also to imply, that the father considered himself entitled for his own benefit; coming in and compounding for the heriot, not as guardian, but as the purchaser, recited to be in possession.

If however this should be considered *primâ facie* an advancement, the son cannot be permitted to take the possession from his father; who may have irresistible evidence to repel the presumption. The Court will never change the possession, while a doubt remains. The father, whose possession has been uninterrupted, and who in every act has treated this property as his own, may perhaps prove declarations, previous to the purchase, that he did not intend advancement; but put in the lives of his sons; as thinking it better to do so than to put in his own. * * The long acquiescence of the defendant, until he had reached the age of thirty-three, makes it probable, that much evidence may be produced.

[47]

Sir Samuel Romilly, for the defendant:

The case of *Dyer v. Dyer* † has been always considered as settling the law upon this point; has been recognized *ever since; and was never questioned. * * *

[*48]

The statement upon the Court roll, describing Finch, the father, as the sole purchaser, is correct: but the question remains, whether he is the purchaser for himself, or his children.

* * *

FINCH
 v.
 FINCH.
 [49]

The circumstance, that the father's life was already inserted, was much relied on in the case of *Dyer v. Dyer*: but it is extremely important, that such a point should be determined upon some general rule; not upon particular circumstances; which may very differently affect different minds. None of the facts, alluded to as likely to be proved, are put in issue. * * *

Mr. Leach, in reply :

[50]

* * This act of the father and the will of the uncle are to be considered as one act: the father having a view to that will, so likely to influence him. The plaintiff has a right to enter into every circumstance, that will sustain the issue, offered by the bill; and it is not required, that the bill should state all those facts. At least leave would be given to amend in that respect.

THE LORD CHANCELLOR :

It is not necessary to determine, how much the plaintiff was obliged to charge in his bill: nothing particular being charged, I cannot give credit for the truth of every thing, that can be suggested at the bar. I remember the case of *Dyer v. Dyer*; † which was very fully considered; and the Court meant to establish this principle; viz. admitting the clear rule, that, where A. purchases in the name of B., A. paying the consideration, B. is a trustee, notwithstanding the Statute of Frauds, that rule does not obtain, where the purchase is in the name of a son: that purchase is an advancement *primâ facie*; and in this sense; that this principle of law and presumption is not to be frittered away by nice refinements. Therefore, if the purchase was of a fee simple immediately, *primâ facie* the son would take: so, if it was a purchase of a reversion; and it is very difficult upon the mere circumstance of the proximity or possible remoteness of possession to do that away. Nothing could be stronger than the circumstance in *Dyer v. Dyer* that the purchaser *had actually devised it. He certainly took it to be his own: but he happened to mistake the rule.

[*51]

It is said, this case does not afford so natural a presumption :

† 2 R. R. 14.

the father's life not being inserted : but I can conceive a purchase of an estate, held for a life : the purchaser meaning to give the reversion upon the determination of that life to his children ; and that life and those of his two children may be better than his own life and those of his children. I cannot however conceive, that this mere circumstance can countervail the rule. It is supposed, that Lord Chief Justice EYRE did not reason accurately by analogy to the cases of powers and copyholds. It is rather difficult to make out, how the defect in those cases came to be supplied in favour of a child. If in the instance of the want of a surrender of copyhold estate the circumstance of the devise to the child is considered, the more natural conclusion is, that the testator, whatever his purpose was, going only so far towards it, and not proceeding to make it effectual, had dropt it. So, the attempt to execute a power is no more than an intimation, that the party means to execute it : but, if all the requisite ceremonies have not been complied with, it cannot be supposed, that the intention continued until his death.† In this case the father paid the money. If he and another person had purchased jointly, the presumption, from the act of the father alone, would not naturally arise from the joint payment. The will of the uncle cannot have any effect. Even if the father had made such a will, having made no declaration at the time of the purchase, that will could not have been looked to as evidence of what he meant by the act of a purchase.

FINCH
v.
FINCH.

The consequence is, that the possession being changed by the law, those, who insist, that the son is a trustee for the father, must make that out ; and may then call for a re-conveyance. The legal title and the presumption at present go together ; and the relief must be obtained by the father hereafter, separating the legal title from the presumption. At present I am not entitled to separate them.

[52]

The order for dissolving the injunction was made absolute.

† See *Holmes v. Coghill*, 6 R. R. 166 (7 Ves. 499).

1808.
April 5, 11.
 ELTON, L.C.
 [52]

SADLER AND JACKSON, EX PARTE.†

(15 Vesey, 52—59.)

Upon a composition a private agreement by some creditors for additional security, though for no greater sum, void.

Creditors bound by acting under a composition, as if they had signed.

Proof by joint creditors under a separate commission; there being no joint estate or solvent partner.

Ground of holding any private agreement by parties to a composition for a greater payment or better security void: a fraud both upon the debtor and the other creditors.

THE prayer of this petition in bankruptcy was to be permitted to prove under a commission against Edward Morgan four notes, payable at three, four, seven, and nine months after date, in the following form:

“LONDON, 14th April, 1806.

“Three months after date we promise to pay to the order of Messrs. Sadler and Jackson 173*l.* 10*s.* 10*d.* value received.

“ED^d. MORGAN.

“TH^s. HOGG.

“HOLMES & HOGG.”

[*53]

In the year 1805 the petitioners had refused to sell any goods upon credit to Holmes and Hogg without security. Holmes and Hogg accordingly deposited the acceptance of Morgan for 700*l.* at twelve months, and an acceptance of Thomas Hogg for 200*l.* as security for goods, *to be supplied. Upon the deposit of these bills the petitioners dealt upon credit with Holmes and Hogg; who in April, 1806, were indebted to the petitioners to the amount of 1,388*l.* 6*s.* 8*d.* In that month Holmes and Hogg called a meeting of their creditors; when the petitioners signed a memorandum; agreeing to accept a composition of 17*s.* in the pound; part of which composition, 7*s.* in the pound, was to be secured by Dickinson; and the remaining 10*s.* in the pound by the promissory notes of Holmes and Hogg: the agreement to be void, unless signed by all the creditors before the 31st of May, 1806.

† See *Jackman v. Mitchell*, 9 R. R. 229 (13 Ves. 581), and the cases there noted up.

When the deed of composition was tendered to the petitioners for execution, an application was made to them to deliver up the two acceptances for 700*l.* and 200*l.*; which they refused to do. They also refused to execute the deed: but upon receiving the four notes, which were the subject of the petition, and which were equal in amount to the instalment of 10*s.* in the pound under the composition, to be secured by the notes of Holmes and Hogg, and payable at the same periods as that instalment, they gave up the two acceptances; and executed the deed.

SADLER and
JACKSON,
Ex parte.

The original agreement of 1806 was not signed by all the creditors. The deed of composition was signed by six creditors only; who, according to the petition, had notice that the petitioners held the acceptances for 700*l.* and 200*l.*, or the four promissory notes, substituted for them. The whole number of creditors was eleven. The petition stated, that there was no joint estate of the persons, who gave the four promissory notes; who were not concerned together in partnership, except in this single transaction.

Sir Samuel Romilly, and *Mr. Giffin Wilson*, opposed the petition; first, as attempting to prove a joint debt under a separate commission; secondly, contending, that this case was governed by the class of cases, relating to compositions, particularly *Leicester v. Rose*,† overruling *Feise v. Randall*.‡ [51]

Mr. Montague, in support of the petition:

Admitting, that, if a creditor, having a security for his debt, enters into any agreement with the principal debtor, by which the right of the surety is varied, without his consent, the surety is released, and that, where a creditor in consideration of executing a deed of composition accepts a security for a greater sum than that, which is to be received by the other creditors, or a greater security for the same sum, the security is void, the decisions upon this subject are limited to the case of a security, received in consideration of executing the deed of composition; not preventing a debtor from giving a security for the residue of the debts, when he has surmounted his difficulties; nor invali-

† 4 East, 372.

‡ 6 T. B. 145.

SADLER and
JACKSON,
Ex parte.

dating a security, which the creditor held long before the composition was in contemplation. In this instance the security given to the particular creditor corresponds with the composition in the amount of the sum and the time of payment. The surety consented; and cannot complain; and the creditors, having notice of the securities, have no reason to complain.

[*55] In support of the other objection, that this petition seeks to prove a joint debt under a separate commission, in the late case *Ex parte Kensington*† the rule, *established by Lord ROSSLYN, which has been followed, rather to avoid farther fluctuation, than as entitled to a preference, was extended by requiring for this purpose proof, not only that there is no joint property, but also, that there is no solvent partner. The fact is, that all these persons are insolvent.

THE LORD CHANCELLOR :

I was not aware of the last decision in the Court of King's Bench; that, where the security is for the same sum, which is secured by the general composition, it is a fraud upon the creditors: but I am much struck with it; and think, there is much principle in it. Where the security is for a larger sum than the composition, it is considered a fraud upon the debtor; as, if the surety pays the larger sum, he has immediately a demand over against the principal; who then has not the benefit of the agreement, which his creditors in general intended to give him. It is also considered a fraud upon the creditors: the reasoning upon an agreement of this sort being, that it is produced by the humanity and feeling of the creditors towards the debtor; but, if it is competent to six out of seven creditors to obtain sureties, even for the same amount, the seventh is imposed upon; as, instead of having the evidence of the other six, that the act, which he is about to do, is reasonable, proved by the same act on their part, he is circumvented by them; obtaining, as against him from their debtor, an advantage, which they will not give him as against themselves. They mislead that creditor into a situation, in which their own acts shew they think it unreasonable that he should be placed. If therefore the

† 9 R. R. 325 (14 Ves. 447). See *Ex parte Elton*, 3 R. R. 84 (3 Ves. 238).

petitioners have a security for the same sum, that is a stipulation for a value and benefit, of which the other creditors are deprived; and my present opinion is, that the last case in the Court of King's Bench is right.

SADLER and
JACKSON,
Ex parte.

As to the allegation, that some creditors had not signed the agreement, if a creditor acts upon the agreement, he is bound as much as if he had signed; and as to the objection upon the solvency of the other parties, there is enough to shew, that they are all insolvent within the rule, stated in *Ex parte Kensington*.†

[56]

THE LORD CHANCELLOR :

April 11.

The first objection to this petition is, that it is an attempt to prove joint notes under a separate commission. The answer is, that there is no joint estate: but the reply to that is, that, though there is no joint estate, some of the makers of these notes are solvent. It is not necessary to renew the discussion upon that point, which occurred lately in the case *Ex parte Kensington*; as I am satisfied, that there is enough to shew, that they were not in circumstances to raise that question, that they were not solvent.

The next objection is, that these four notes, as far as Holmes and Hogg were concerned, were a fraud upon those persons; who were making a composition with their creditors; that they were also a fraud upon the creditors; and therefore by the policy of the law no person, who signed these notes, is bound by them. Under the circumstances of this case, I think, the last decision of the Court of King's Bench reaches it. The deed of composition, speaking the language of all the creditors, not only to their debtor, but to each other, is a common declaration, that the securities, mentioned in that deed, are to be taken in full discharge of their respective debts; and they covenant with Holmes and Hogg accordingly, *that the sum, so secured, is to be in full satisfaction and discharge of their respective debts; and that without any reserve: each creditor releasing and discharging Holmes and Hogg and each of them: so that neither they, nor their representatives, shall have any claim or demand, &c. If the transaction had stood upon this agreement, the effect

[*57]

SADLER and
JACKSON,
Ex parte.

of it would be this: debtors, meeting their creditors; and offering a composition of 17s. in the pound, secured according to that proposal; pressing upon the humanity of each creditor; and representing to each individual, that every other creditor has acceded to that proposal: every creditor, who signs, thereby making the same representation.

It seems to have been suggested to the petitioners, that the execution of this instrument would put an end to the bills of 700*l.* and 200*l.* then in their possession, applicable to their demand; and certainly that would have been the effect of it. They agreed therefore to give up those securities; stipulating however to have Morgan and Thomas Hogg as sureties for the four instalments of the composition, as well as the security, which the other creditors were to have for those payments. The question upon that is, first, whether the fact was known to all the rest of the creditors: if it was not, secondly, as to the consequence. Those who contend, that it was known to all the creditors, are bound to prove it; and upon the evidence it seems, that it was not known to all the creditors: that however, if doubtful, may be the subject of inquiry.

[*58] As to the effect in law, taking the fact not to have been known to all the other creditors, I had, when I first read this petition, a notion, which turns out to be erroneous; that, if a collateral security was given only for the same amount as the general composition, that would not *be a fraud. That was the opinion of Lord KENYON in *Feise v. Randall*; † with regard to which case I take the liberty of saying, in terms less qualified than the language of the Court of King's Bench in *Leicester v. Rose*, ‡ that the former case is over-ruled. The antecedent security makes no difference. The parties clearly thought that it did not; conceiving, that it would be destroyed by the subsequent instrument. They must therefore be considered, taking a new security, to all legal effect as if they had not an antecedent security. Upon principle, then, if two creditors inform a third, that upon their view of the justice and humanity of the case they are so seriously persuaded, that the other ought to take the security of the debtor for 17s. in the pound, and to discharge

† 6 T. B. 146.

‡ 4 East, 372.

him from the rest of the demand, and, not only to take his own security, but not to oppress him by requiring any other person to come under an obligation for payment, can a clearer misrepresentation be stated, than that at the same instant, when they are desiring that creditor to take the security of the debtor himself alone, they are procuring the security of other persons for themselves? The principle being, that in such a transaction all should deal upon equal terms, that creditor ought to be put in a situation, that would enable him to require, that those persons should become security for him also: at least the creditors, obtaining that security, ought not to represent, that they are not obtaining it: but, proposing to the other creditor to deal upon equal terms, they ought to impart to him all the benefit of that security.

SADLER and
JACKSON,
Ex parte.

This is therefore in principle a direct contradiction of the good faith of the transaction. The legal effect also of this instrument, executed, after those notes were given, *is a release. The case of *Leicester v. Rose*† is a direct authority against this petition. The circumstances, stated in the report of that case, are not material to the reasoning, upon which it is supported. The principle does not rest upon those facts. The judgment of the Court of King's Bench is unanimous, that the case was brought within the authorities; and, if I may presume to say so, they decided right. I concur in the doctrine there laid down; and consequently, whatever was the intention of these petitioners, their case appears to be within the principle and reasoning of that authority; and their proof cannot be admitted.

[*59]

I do not object, if there is any doubt upon the facts, to let them put it in some mode of trial. They must make out, that all the creditors knew this; as *primâ facie* upon the instrument it must be taken, that they did not know it. The point, as to the execution of the instrument, is not, whether they actually signed. In this jurisdiction, which is both legal and equitable, a creditor who has not signed may be bound, if by any act he has assented.

The petition was dismissed.

† 4 East, 372.

1808.
April 29.

ELDON, L.C.

[60]

YALLOP, EX PARTE.†

(15 Vesey, 60—71.)

The registry of a ship is conclusive evidence of the property upon the policy of the Registry Acts; even against the claim of joint creditors, upon a joint purchase and various acts of apparent joint ownership.

Distinction between transfers by the act of the parties, and by operation of law.

Effect of a public registry upon the order and disposition clause in the Bankruptcy Acts. (On this point see *Colonial Bank v. Whinney* (1886) 11 App. Ca. 426, 56 L. J. Ch. 43, 55 L. T. 362).

Policy of the Registry Acts.

In April, 1805, Henry Cooke and John Herbert, partners, as merchants in London, contracted to purchase the ship *Euphrates*, employed in the service of the East India Company, for 20,000*l.*; and accordingly in May or June they accepted eleven bills of exchange, drawn by Messrs. Clay, the owners of the ship, to that amount; and, as a collateral security, Cooke and Herbert, being each possessed of five sixteenth shares of the ship *Devonshire*, by bill of sale, dated the 22nd of June, 1805, severally assigned their shares of that ship and the policies of insurance, effected by them on such shares; by a defeasance of the same date, reciting the purchase of the *Euphrates*, as made by Cooke and Herbert, and declaring those policies to be for further securing the 20,000*l.* Philip Herbert, the brother of John, agreed with his brother and Cooke to purchase one fourth of the ship; and accordingly a bill of sale of one fourth was made to Philip Herbert; who gave security to Cooke and Herbert for the price of one fourth of the ship and her outfit. A bill of sale of the remaining three fourths was made to Cooke alone; and the usual indorsements were made on the certificate of registry under the Registry Acts;‡ declaring, that Messrs. Clay had sold three fourths of the ship to Cooke, and one fourth to Philip Herbert.

The ship was taken up by the East India Company; and her outfit, amounting to 7,672*l.* 6*s.* 10*d.* was furnished by Cooke and Herbert jointly; and insurance was made *by them jointly on three fourths of the ship, as their joint property; the shares

[*61]

† See note to *Curtis v. Perry*, 6 R. R. 28.—O. A. S.

‡ Stat. 26 Geo. III. c. 60; stat. 34 Geo. III. c. 68 (since repealed).

YALLOP,
Ex parte.

were treated in their partnership books as their partnership property; their commission, as managing owners, was debited to the ship in their partnership books; and every act was done, short of an actual conveyance and registration in their names, which could mark those three fourths of the ship as the joint property of Cooke and Herbert. On the 8th of July, 1805, a new register was taken out by Cooke and Philip Herbert; and they were declared to be the owners, and Philip Herbert the master. Cooke after the departure of the ship made over by bill of sale several small shares as a security for separate debts of himself and joint debts of Cooke and Herbert. In December, 1805, a joint commission of bankruptcy issued against Cooke and John Herbert. Their acceptances on account of the purchase-money of the ship had been paid, to the extent of 7,500*l.* The sum of 12,500*l.* remaining due to Messrs. Clay, was claimed as a debt against the joint estate of Cooke and Herbert. The assignees sold the three fourths of the ship for 7,175*l.*

The petition was presented by a joint creditor of Cooke and Herbert; praying an application of the three fourths of the ship, and the produce, as their joint property.

Mr. Richards, and *Mr. Owen*, in support of the petition:

The question upon this petition is, whether the interest in this ship must under the Registry Acts be considered as separate property to the prejudice of the separate creditors. The principle, upon which the Registry *Acts were framed, cannot be affected by treating this as joint property. The case of *Curtis v. Perry*† contains many circumstances, that are not to be found in this case: first, *Mr. Chiswell*, being a Member of Parliament, could not hold an interest in such a concern: and a claim under him could no more be admitted in a court of equity than a bill for a reconveyance of a qualification for a seat in Parliament. *Nantes*, the other partner, when he became a bankrupt, was the sole owner in every point of view. This is a dry case, that has never been decided; involving a question, which, as it did not arise in that case, your Lordship anxiously avoided; a conveyance of a ship to one partner; paid for by the joint effects:

[*62]

† 6 R. R. 28 (6 Ves. 739).

YALLOP,
Ex parte.

dealt with as joint property ; so as to be within the statute of James I. ; † and being joint property to all intents and purposes, except in the view of the law, with reference to these Acts of Parliament. The Legislature has not in either of these Acts intimated, that cases of this sort may not exist. Whatever may have passed between the partners, whatever object they may have had, either to press upon the joint creditors, or to serve any private convenience of their own, the joint creditors are, as against them, entitled to say, this is joint property ; and consequently as against their separate creditors.

Sir Samuel Romilly, Mr. Cooke and Mr. William David Garrow for the separate creditors :

[63] * * If this case is not within the Act of Parliament, it is a dead letter ; and can have no operation. It will never be necessary to register the real owner, if the persons registered become trustees upon the doctrine of implied trusts, for those, who agree to be the owners. * * *

[64] *Mr. Richards*, in reply :

[65] This case is perfectly new in circumstances ; and is not touched by the principle, upon which *Curtis v. Perry*‡ was decided. * * These acts must be considered as capable of forming a trust by operation of law ; according to the distinction, taken in the judgment of that case ; and such cases, as in the instance of executors and assignees, are necessarily not within the statute. * * *

THE LORD CHANCELLOR :

[*66] Upon every view of this case, as it appears to me, a judgment, that this interest in a ship should be taken as joint property, if the question arose in a contest between the partners themselves, would destroy the whole effect * of these Acts of Parliament. The consideration having been paid by bills, making them both liable, those bills, when paid, are evidence, but no more than evidence, .

† Stat. 21 Jac. I. c. 19, s. 11 ; 6 ‡ 6 R. R. 28.
Geo. IV. c. 16, s. 72.

YALLOP,
Ex parte.

that the money, which formed the consideration for that purchase, was joint property. Though it is not necessarily so, I will take that as a clear fact. The partnership property therefore having purchased this interest in the ship, the bill of sale was made, as it must be taken, with the consent of both parties, to one of them only; and the registry was made in the name of one; which also must be taken to be with the consent of both: the petition not suggesting the contrary. The registry could not have been granted without an affidavit by Cooke, that he was the sole owner; and the fair conclusion is, that Herbert knew what was done.

These two Acts of Parliament† were drawn upon this policy; that it is for the public interest to secure evidence of the title to a ship from her origin to the moment, in which you look back to her history; how far throughout her existence she has been British-built, and British-owned; and it is obvious, that, if, where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these Acts may be defeated; as neutrals may have interests in a ship, partly British-owned; and the means of enforcing the Navigation Laws depend upon knowing from time to time, who are the owners, and whether the ship is British-owned, and British-built. Upon that the Legislature will not be content with any other evidence than the registry; and requires the great variety of things, prescribed by these Acts. They go so far as to declare, that notwithstanding any transfer, any sale, or any contract, if the purpose is not executed in the mode and form prescribed by the *Act, it shall be void to all intents and purposes. The consequence, established by positive and repeated decisions, is, that upon a contract for the purchase of a ship, which it may be supposed might have been executed without public mischief, though by force of that contract and by operation of law the purchaser would be the owner in equity from the moment of the purchase, and the vendor from that moment would be divested of all interest, yet it is decided, that these Acts are so imperative, that, if they rest upon the contract, it cannot be said of a ship, as of an estate, that by operation of law, and by force of the

[*67]

† Stat. 26 Geo. III. c. 60; stat. 34 Geo. III. c. 68.

YALLOP,
Ex parte.

contract, the ownership is changed; and if the money had been paid, the decision would be upon the same principle; and it must be recovered by another form of proceeding. There is no doubt also, that, if the person, contracting for the purchase, had taken possession and effected insurances, and afterwards brought an action upon the policy, averring, that the interest in the ship was in him, though I agree with Lord ELLENBOROUGH in *Robertson v. French*,† that it is sufficient *prima facie* to shew, that he dealt as owner, yet, if it appeared in the course of the examination of witnesses, that he was entitled only under an equitable contract, under those circumstances a court of law would say, the averment was not made out by the evidence.

[*68]

In that view the case of *Camden v. Anderson*‡ appeared to me an extremely strong and weighty decision. It is clear, that in an action upon a policy of insurance a court of law takes notice of the doctrine of trusts; holding, that the trustee has in respect of the legal interest an insurable interest; as it was always held, that the *cestuis que trust* has in respect of the equitable interest; and [it] is not to be disputed, that Lord KENYON, who at that *time presided in the Court of King's Bench, knew as well as any judge who ever sat in Westminster Hall, that previously to these Acts of Parliament, if a partnership of four had bought a ship in the names of one or two of them, or a stranger, advancing their money, they would in equity have been the owners of that ship: yet his Lordship held clearly in that case, that, the four partners, who had agreed, that two of them should be the visible owners upon the bill of sale and the registry, declaring in that action as four joint owners, could not be heard in a court of justice against the positive terms of the Act of Parliament to give a representation of the title, different from that, which they had held out by the registry and the affidavits; and though, as among the four, all equity and justice required, that the ship, and therefore the proceeds of the policy of insurance, should be considered as partnership effects, those plaintiffs were not permitted to recover. That has never been altered by any subsequent decision of the Court of King's Bench.

There is a wide difference between title, set up under the

† 7 R. R. 535 (4 East, 130).

‡ 5 T. R. 709.

contract of the parties, and under the operation of law, or the act of God ; and that is authorized by a fair construction of the Act of Parliament. Speaking of transfers it could not be intended to apply to transfers, that could not be carried through in the mode, and by the means, prescribed : the transfer, for instance, from a testator to his executors ; or the transfer to assignees in bankruptcy. The next of kin, or residuary legatees, take by operation of law ; not under a contract for transfer, capable of being carried into execution in the mode prescribed. A transfer of that description therefore is not that species of transfer, the regulation of which was in the contemplation of the Legislature : but if the transfer is of that species, which was the subject of regulation, the Legislature expects obedience from all parties, *contending for interests and title under such acts of transfer.

YALLOP,
Ex parte.

[*69]

The argument of the joint creditors must go to this extent ; that, if these partners had not purchased this interest in the ship in the name of one of themselves, a circumstance not material, but a stranger had made the purchase, advancing the money of the partners, and they had permitted the bill of sale to be made in his name, he swearing, that he was the sole owner, and the registry being made by him as such, as the partnership advanced the money, therefore, notwithstanding all this parliamentary regulation, upon principles of public policy, with regard to the mode, in which for the benefit of the public that property was to be acquired, they are to be considered the owners ; as if the subject of the contract had been an estate. That is directly inconsistent with the Act of Parliament ; and if it could prevail, instead of securing the evidence, which the public was intended to have, how far the ship through every period of her existence was British-owned, and British-built, it would be the easiest thing to cover the ownership of neutrals and enemies, without a possibility of detection by means of the Act ; which was intended to furnish decisive and incontrovertible evidence of those facts.

This part of the case therefore is against this claim. The creditors have no other interest than the bankrupt, as far as these Acts go. They come simply as joint creditors ; not as having any lien for repairs, or necessities, furnished to the ship ; and joint creditors operate their remedies upon the equity, that

YALLOP,
Ex parte.

[*70]

partner has against partner : not by their own rights : not as having any lien by themselves ; but through the equity of one partner to have a distribution. If therefore Herbert himself could not *have claim, the creditors cannot claim under the statute of James.†

The case of *Curtis v. Perry*, though it does not rule this case, furnishes a strong intimation of my opinion, that the distinction between trusts by operation of law, unconnected with acts of the persons, claiming interests, and trusts, in a sense perhaps by operation of law, but arising out of the acts of the parties, not regulated by the Act of Parliament, is founded in principle. As that was a most important case, and the first of the class, I took a more enlarged view of it than was necessary for the decision ; and with a view to the application of the principle to future cases, I entered into the consideration of the circumstances of Chiswell's conduct ; as proving, not only, that the directions of the Act of Parliament had not been observed, but farther, that he was pressed by motives resulting from his particular situation, to take care, that the Act should not be observed ; and to hold out studiously to the world, that it had not been observed ; and that he was not to be considered the owner of those ships. Two principles therefore stood in his way : first, that he had broken in upon the policy of the Act of Parliament ; and could not be permitted to say, he had property of this nature, not subject to the regulations of the Act ; and farther, that he had done so for the purpose of defeating another law ; meaning to hold himself out not to be owner of those ships ; as they were bound by contracts, of which he, being a Member of Parliament, could not have the benefit. Under those circumstances it could not possibly be contended, that he had that character of owner, which for his own private and fraudulent purpose he had disclaimed. The object of *those inquiries was to ascertain, how far he had acted in that character ; and the result was, that, instead of actually interposing, he anxiously withdrew from the apparent ownership.

[*71]

Upon the first question, made by this petition, whether by the manner, in which this ship was dealt with, it is partnership

† Stat. 21 Jac. I. c. 19, s. 11.

property, my opinion is, that no such dealing in the partnership could possibly make it partnership property, as between the partners; as that would be a direct infringement of the Act of Parliament. A distinct question is, whether, though it cannot be so taken as between the partners themselves, the ship, if dealt with in that manner, ought not upon the statute of King James to be considered as partnership property; whether it was so held, that the joint creditors can say, it was partnership property before the bankruptcy; or, on the other hand, the title being of a public, registered, nature, that public registry must not decide, as among all mankind, where the property is. My opinion is, that the registry is the evidence of the property; and must be taken to be the evidence of it even among the creditors.

YALLOP,
Ex parte.

Upon every ground therefore this petition must be dismissed. At the same time in this case also I shall not refuse liberty to file a bill; if they think fit.

LEIGH v. LEIGH.†

(15 Vesey, 92—112.)

1808.
Feb. 1.
May 9.

Devise to the devisor's sister A., then unmarried, for life; with remainders to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail: remainder to the first and nearest of his kindred being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body.

ELDON, L.C.
THOMPSON, B.
LAWRENCE, J.

[92]

A person, claiming under the last limitation, must be of the name, as well as the blood; and the qualification as to the name is not satisfied by having the name, taken by the King's license, previous to the determination of the preceding estates.

Construction of the description "*proximo de sanguine*."

THE bill in this cause stated the will of Lord Leigh, dated the 11th of May, 1767; devising all his estates, subject as to part to a term of five hundred years, to his sister Mary Leigh for her life; with remainder to her first and other sons in tail male; remainder to her daughters in tail general, as tenants in common; remainder to his sister Ann Hachet for her life; remainder to her first and other sons in tail; with a limitation in remainder

† *In re Roberts* (1881) 19 Ch. D. 520.

LEIGH
v.
LEIGH.

in these words: "Unto the first and nearest of my kindred being male and of my name and blood that shall be living at the determination of the several estates herein before devised and to the heirs of his body lawfully begotten."

[*93]

The bill farther stated the death of Lord Leigh in the year 1786, and of Mary Leigh in June, 1806, without issue: Ann Hachet having died in her lifetime without issue; and that at the time of the death of Mrs. Leigh the plaintiff was and is the first and nearest of kindred, being male, of the name and blood of the testator, *living at the death of the said Mary Leigh; and that, being the son of John Smith, Esq. he had on the 8th of April, 1802, obtained his Majesty's license, that he and his issue might assume and take and use the surname of Leigh, instead of that of Smith, which surname of Leigh he has ever since assumed, taken and used.

The bill prayed an account of the rents and profits of the estates, formerly belonging to Lord Leigh, and comprised in the term of five hundred years, and that the trustee of the term may assign it to the plaintiff; and deliver up to him all deeds and writings respecting it.

To this bill a demurrer was put in.

Sir Samuel Romilly, Mr. Trower, and Mr. East, in support of the demurrer. * * *

Mr. Richards, Mr. Leach, and Mr. William Agar for the defendant.

Sir Samuel Romilly in reply.

[The arguments of counsel and the principal cases cited by them are referred to in the opinion of LAWRENCE, J.]

May 9.

[102]

LAWRENCE, J. having stated the case, delivered the following opinion:

The demurrer to this bill, admitting the facts, stated in it, has raised the questions; upon which your Lordship has been pleased to call upon us for our assistance; which were, whether it be not necessary, that the person, entitled under the devise in question, should be both of the blood and name of the testator; and, if it

be, whether the being of his name is satisfied by the plaintiff's having assumed the name of Leigh by his Majesty's licence; in answering which the only inquiry to be made is, what was the intent of the testator; and whom did he mean to describe by the words he has used.

LEIGH
v.
LEIGH.

Though the plaintiff, by taking the name of Leigh, may have brought himself within the letter of the will, yet the demurrer does not admit, as was said in argument, that he answers the description in the will; for that will depend on whether the plaintiff comes within the meaning of the words; as they have been used by the testator; and, though it be true, that, if that meaning be ascertained, no reasoning from supposed cases can induce the Court to put a different construction upon the will, but can only lead to a conclusion, that the testator did not see all the consequences of the disposition, he may have made, yet in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies, which may arise out of cases, falling within one construction, or another, have constantly been attended to, with a view of ascertaining such meaning.

[103]

In the course of the argument it was stated at the bar, and I think justly, that the testator in requiring the remainder-man to be of his name could only have one of two objects in his view: viz. either that of continuing his estate in the name of Leigh from attachment to it, by inducing those, who from time to time might answer the other descriptions in his will, to assume that name, and thereby to complete in themselves the whole description, which he willed the remainder-man should answer; or else, that of adding to the circumstances, he had before required of the remainder-man, a farther character, independent of any act of his own: and which could only belong to him in consequence of his descent from the same stock with the testator; with a view of excluding all of that stock, who might not have that additional character belonging to them.

In order to ascertain, whether the first of these two objects was that, which the testator had in his view, the *situation and circumstances of his family at the time of making his will have great weight. He does not appear to have had any very near relations but his two sisters; for how near a cousin, Mr. Craven

[*104]

LEIGH
F.
LEIGH.

was, does not appear; one of his sisters was single; and the other married to a gentleman of the name of Hachet. These sisters in different degrees were the immediate objects of his bounty; and were with their children the only persons, whom in the disposition of his real estates he can be said to have distinctly contemplated. To his sisters he gave estates for life, and to the sons and daughters of the one and the sons of the other he gave estates tail, without any reference whatever to his own name.

From these limitations in his will it has been argued, and I think truly, that his requiring the name of Leigh of the remainder-man could not proceed from any anxiety about the continuance of his name; as such anxiety is perfectly inconsistent with a disposition, which, if his estate followed the first limitations of his will, in the family of either of his sisters, (as at the time of making his will it was likely to do) would occasion an immediate disuse of his name during the lives of both his sisters; if the single one should marry: (an event he certainly contemplated); and during the lives of the issue male and female of the one, and of the issue male of the other; if they should have such issue; and a disuse of the name for ever; if the remainder in question should be barred by any of those, to whom the estate was limited in tail. Had an attachment to his name been his motive, the natural thing for the testator to have required would have been the continued and uninterrupted use of it by all those, to whom he had limited his estate; and his not requiring it of his sisters and their issue, but expecting it from a remote remainder-man, is not, I think, satisfactorily accounted for, from a supposition,

[*105]

that they would have felt *the value of the limitations in their favor lessened by their being called on to bear the name of their ancestors; and the extinction of the name for generations, and possibly for ever, is not to be reconciled with any solicitude in the testator to preserve it; and therefore an attachment to his name does not appear to me the reason of his requiring the remainder-man to be of that name.

Another circumstance, from whence the same inference may be drawn, is that of the testator not having taken the usual and proper steps to provide, that the first and nearest of his kindred

should be of the name of Leigh ; by making it a condition, that he should assume the name, if at the determination of the prior estates he did not bear it ; for, whether the remainder-man must have all the enumerated qualifications to be entitled, or whether he may be entitled, though he be not the first and nearest of the testator's kindred, being male, provided he be the first and nearest of the name, the consequence of not taking such steps might be, that the remainder might be entirely defeated ; or the estate go to one, not the first and nearest ; without any default in him, who might be the first and nearest of the testator's kindred ; for, if all the enumerated circumstances must unite, an infant of a day old, who united in himself every part of the description, but that of the name, and, on account of his recent birth, could not assume the name, would by his birth prevent the remainder vesting in any other ; and, if the terms of the limitation would carry the estate to the first and nearest, who at the determination of the prior estate might by assumption bear the name, an infant of the description I have mentioned would lose the estate, without any default whatever, by one more remote taking the name ; and that surely could not be meant by the testator.

LEIGH
v.
LEIGH.

Another consequence would also follow from the construction contended for by the plaintiff : viz. that during the continuance of the prior estates, which might have lasted for several generations, every one, who was first and nearest of kin to the testator, being male, not bearing the testator's name, must have, from time to time, assumed the name of Leigh ; to qualify himself to take, in case the prior estates should determine, while he answered the description required ; although the persons, so qualifying themselves, could be continually liable to be disappointed by the births of others, who would be prior and nearer ; by whatever rule that proximity should be traced : if by the rules, which regulate the descent of real estates, by the sons of females of nearer degree ; as would happen by the daughter of an elder brother having a son ; who would, according to the rules of inheritance, be preferred to a cousin ; who might before the son's birth have assumed the name : or, if the next of kin is to be looked for by the rules of the civil law, the same thing

[106]

LEIGH
v.
LEIGH.

would happen, if the son of a female should be nearer in blood than a cousin, who might have assumed the name; as would be the case, if a second cousin were to assume the name, and a female first cousin should afterwards have a son.

If any rational construction can be put on this devise, I think, it cannot be supposed, that the testator meant so idle a thing as to induce his relations prospectively to take his name, when it might benefit none of them; as the prior estates might never determine, so as to give effect to the remainder; and, if it should take place, might occasion a frequent assumption of the name to become vain and nugatory; and on these grounds I conceive, that the testator did not mean, that the person, to take in remainder, should be one, who, in order to answer and complete the description in the will, might assume his name: *but that, when he spoke of the first and nearest of his kindred, being of his name, he meant, that he should be one, whose family name was Leigh; according to the opinion of the House of Lords in *Barlow v. Bateman*† and of Lord HARDWICKE in the cases, put by him by way of illustration in *Pyot v. Pyot*;‡ and this I think will appear, if effect be given to the several expressions, used by the testator.

[*107]

By the will the person, to take the remainder, is to have these several qualifications: viz. he is to be the first and nearest of his kindred: the person must be a male: he must be of his name and of his blood. The three first circumstances, those of his being first and nearest of the testator's kindred and a male, need not for the purpose of the present question be considered. It will be sufficient to attend to the two last.

In a general sense the being of a man's kindred is being of his blood; as the word "consanguinity," which is the same as "kindred," imports; but when, in addition to being of his kindred, a testator requires, that the object of his bounty shall be of "his blood," he must be understood as speaking of that blood, which with some propriety may be called *his*; namely that, which in tracing an heir is considered as the blood of the most dignity and worth. Such in this case is the blood of the Leighs in contradiction to that of any other of the testator's

† 3 P. Wms. 65; 4 Br. P. C. 194.

‡ 1 Ves. Sen. 335.

ancestors. When therefore he required, that the remainder-man should be of his blood, in addition to his being of his kindred, his object was, as I conceive, to ascertain, that stock or family, to which the devisee should belong; and that the word "blood," as used by the testator, must have the same sense given to it, as was given by Lord HARDWICKE in *Pyot v. Pyot* † to the words "of the name of the Pyots."

LEIGH
LEIGH.

The next thing to be considered is, what did the testator mean by requiring, that the remainder-man should be of his name; and I do not think, that this testator by the words "of my name" meant the stock or family of Leigh; for according to the common rule of interpretation, which requires, especially in wills, that every word shall have some effect given to it, if it may be, and none rejected, or considered as tautologous, if a distinct and consistent meaning can be put upon it, the testator must be taken to have intended something beyond what was expressed and contained in the other words, which he had used; and, I think, a very obvious meaning may be put upon the word "name" different from, and consistent with, that, which, I think, belongs to the word "blood;" and that it must be understood as intended to exclude the female line of the stock or family of the Leighs; which stock he may be understood as marking with the word "blood," and as intended to narrow the number of persons of that family or stock, from among whom a remainder-man was to be sought for; by requiring, that the family name of such person should be Leigh; or, in other words, that he should be a person having the name of Leigh from his agnation to the testator; thereby excluding any person, who could only claim to be of kin with the testator by descent from a female of his family.

[108]

If the plaintiff does not fall within the description in the will, it will not be necessary to consider, what relation of the testator would fall within it; or to inquire, whether any thing different was meant by the word "first" from what was intended by the word "nearest." Had the word "first" only been used, possibly it might be held to have been the intent of the testator, that the remainder should go to such

† 1 Ves. Sen. 335.

LEIGH
v.
LEIGH.
[*109]

person, as would take the estate, if it had descended to the testator in tail male *from his eldest known ancestor of the name of Leigh; and possibly if the word "nearest" only had been used, the same interpretation might be put upon this devise; according to the sense, which in the cases, referred to in the Touchstone,† mentioned by *Mr. Agar*, has been put upon the words *proximo de sanguine*. But if the words "first and nearest" cannot be interpreted as meaning the same thing, viz. the first in a course of descent, and it should happen, that there is no person of his name and blood, who unites in himself the circumstances of being the first and nearest of the testator's kindred, the devise may be void for want of a person to take, answering the description in the will: but if there be such person, who is also a male, and whose name, being Leigh, is referable to his descent from a common ancestor with the testator, no difficulty will arise from the use of both these expressions. However it will be time enough to consider such points, when some person shall claim the estate, who may derive the name of Leigh from his ancestors: but with respect to the present plaintiff my opinion, which I submit with deference to your Lordship, is, that the person to take under the devise in question must be both of the testator's blood and name; and that the plaintiff, having assumed the name of Leigh in pursuance of his Majesty's licence, does not satisfy the words of the will; which require, that the person to take in remainder, after the determination of the estates, limited to his sisters and their issue, should be of his, the testator's, name; and I am of opinion the demurrer should be allowed.

THOMPSON, B.:

[*110] The question upon the facts, stated by this bill, and admitted by the demurrer, is, whether the plaintiff is *become entitled to the estate, devised under this will, as answering the description, contained in that will. It has been contended for the plaintiff, that the fact, set forth by the bill, that he has assumed the name of Leigh by his Majesty's licence, is sufficient to satisfy that part of the description; which in the event, that has

† *Shep. Touch.* 436.

happened, requires him to be of the name, as well as to possess the other requisites of being the first and nearest of his kindred, being male. Upon the best consideration, that I can give this case, I do not conceive, that the plaintiff upon his own statement has made out a title under this will. The meaning of this will I conceive to be, that the person, who is to take in default of the preceding limitations, should be one, who could make himself out to be the first and nearest of the testator's kindred, being male, and of his name and blood; possessing that name by inheritance, if it may be so expressed, from the common ancestor; and not merely assuming it; though by his Majesty's licence. The testator has not imposed any condition upon his first and nearest of kindred, being male, that he shall take the name of Leigh; nor does any anxiety to perpetuate the name with the possession of the estate appear; as in the devise to his sisters and their issue there is no provision, requiring them or their issue to take the name: nor does he use the name, as connected with his devisees, until the clause in question; which is not to operate, until the period, which he contemplated, the deaths of both his sisters, and the failure of the issue of one, generally, and of the issue male of the other, should arrive.

LEIGH
v.
LEIGH.

Some of the cases cited appear very material. The case of *Pyot v. Pyot* † was a disposition by will in a certain event of real and personal estate to the testatrix's *nearest relation of the name of "the Pyots:" so it appears in the Register's book; which I have examined; and not "of Pyot." Lord HARDWICKE says, a person of nearer relation, but originally of another name, changing it to Pyot by Act of Parliament, would not come within the description; and, though in the contemplation of that case his Lordship admitted, that sisters, who at the date of the will were of that name, and had afterwards married, and a sister, who had before that time changed her name by marriage, should share, he did so under an express declaration, that the term "relation" is *nomen collectivum*: that the testatrix intended the same stock: the name there standing for the stock; and it appears by the Register's book, that those persons and the testatrix were both descended from the common ancestor. At

[*111]

† 1 Ves. Sen. 335.

LEIGH
v.
LEIGH.

the conclusion of his judgment Lord HARDWICKE refers to a case in the House of Lords ; where the House of Lords held, that a voluntary change of name was not a performance of the condition to marry a person of the testator's name. That case is *Barlow v. Bateman* : † a decision, which completely warrants the proposition, that a devise upon condition of marrying a man of a particular name is not satisfied by marrying a man, who voluntarily changes his name. That case is stronger than this ; as there no connection of blood was required : she might choose from the world at large any man, who bore that name.

Upon the whole of this case I have only to conclude with my humble advice to your Lordship, that the plaintiff upon his own statement is not within the whole of that description, which he ought to have ; in order to sustain the character of a person, entitled to these estates under this decree in the events, that have happened.

[112] THE LORD CHANCELLOR :

It is unnecessary for me to attempt, what would be of no use to the bar, to repeat, in terms not so apt to express them, the grounds upon which my own opinion is formed. I shall be content to acknowledge my obligation to the learned Judges, and simply to state, that the advice which I have received, confirms the opinion I had upon first reading this bill ; and which throughout the argument has never varied.

Therefore, without farther detaining the Judges, I shall merely say, that the title, stated by this bill, is not one which proves, that the plaintiff answers the description required by the will ; and consequently my judgment is, that this demurrer must be allowed.

† 3 P. Wms. 65 ; 4 Br. P. C. 194.

WALKER v. SHORE.

(15 Vesey, 122—126.)

1808.

May 29.

ELDON, L.C.

[122]

Bequest of the produce of the sale of a copyhold estate to A. the wife of B. for life; and after her death to divide the principal among the children of B. and C. equally; and of the testator's reversionary interest in Bank Stock on the death of D. if in his name at his decease, and if not, at D.'s death, equally among the same children. Vested interests in all the children; comprising those who died, and those who came into existence after the death of the testator, and during the lives of the tenants for life.

The interest of small legacies ordered to be paid to the mother, for maintenance, upon her affidavit, that the father was abroad in very embarrassed circumstances.

FELIX VAUGHAN, being seised to him and his heirs, according to the custom of the manor of Tottenham, of one undivided fourth-part of copyhold premises, which he had surrendered to the use of his will, and being entitled, among other personal estate, to a reversionary interest in 2,000*l.* Bank Stock, after the death of Mary Baker, by his will, dated the 25th of May, 1798, after certain legacies, made the following disposition:

"I leave all that my copyhold ground-rent in Tottenham Court Road to my executors upon trust that they shall at such time and in such manner as they shall think proper (their receipt to be a sufficient discharge to any purchaser or purchasers thereof) make sale thereof; and place the money arising from such sale upon such securities as they shall think proper; and to pay and apply the dividends and produce thereof to the sole and separate use of Jane Walker (wife of Thomas Walker, of Manchester) for and during her natural life independent of her present or any future husband, his debts or engagements: and after her decease to divide the principal money arising from such sale amongst the children of the said Thomas and Richard Walker share and share alike; and I also leave to my executors all that 2,000*l.* capital Bank Stock reverting to me on the death of Mrs. Mary Baker upon trust to make sale thereof in case the same shall be in my name at my decease and if not as soon as the said *Mary Baker shall die at the discretion of my executors and to apply the money arising from the sale thereof or the said

[*123]

WALKER
v.
SHORE.

stock itself equally amongst the children of the said Thomas Walker and Richard Walker."

The testator died in 1799. Mary Baker afterwards died. Hannah, the wife of Thomas Walker, by mistake in the will called Jane, was still living. At the death of the testator there were six children of Thomas Walker; of whom one died since the death of the testator; having attained the age of twenty-one, and assigned her interest in the trust funds under the will to her father Thomas Walker. There were also at the death of the testator six children of Richard Walker; and since the death of the testator, but before the death of Mary Baker, Richard Walker had another child born, Felix Walker. William Walker, one of the children of Richard Walker, died in 1804; and his father was his administrator.

The bill was filed by Thomas Walker, and the surviving children of Thomas and Richard Walker, except Felix, against the executors of Vaughan, the testator, and against Richard Walker and Felix Walker; praying, that the plaintiffs may be declared entitled together with Richard Walker, as the only children, and the representative of the deceased child, who were living at the death of the testator, to one twelfth part, respectively, of the fund, produced by the Bank Annuities, and of the money hereafter to arise from the sale of the copyhold estate; and for an allowance for maintenance of the infants out of the interest of their shares.

[*124] It was admitted at the bar, and by the LORD CHANCELLOR, that children, who died during the lives of Hannah *Walker and Mary Baker, took vested interests, transmissible to their representatives; according to *De Visme v. Mello*,† and many other cases.

Sir Samuel Romilly and Mr. Phillimore, for the plaintiffs:

Felix Walker, a child born after the death of the testator, is not entitled to share under this will. There are two circumstances, taking this out of the general rule. The testator clearly intended to give to the same persons the produce of the copyhold estate and of the Bank Stock: yet it must be contended against the plaintiffs, that different persons are to take them; as

† 1 Br. C. C. 537.

they are to be distributed upon the deaths of different persons. There is but one mode of giving this property to the same persons; and that is by giving it to those, who were living at the death of the testator. Another circumstance is, that, as to the Bank Stock, this is not a case, in which the testator has himself given an estate for life, and then the reversionary interest: he has not himself created any interest, by which the vesting is to be postponed: but this is a reversionary interest, which he previously had, and gives to the children of the two persons named.

WALKER
C.
SHORE.

Mr. Martin and Mr. Wingfield, for the defendants :

This case falls within the general rule, that the property is to be distributed among all the objects, who shall have come into existence before the death of the tenant for life. The same sort of disposition would not suit the different interests to be had in the two subjects: an absolute, vested, estate in the copyhold; a reversionary *interest only in the stock. To that difference of interest, not to any different intention, is to be attributed the distribution of the one fund immediately upon the death of Mary Baker.

[*125]

THE LORD CHANCELLOR :

The construction, which I am obliged to make in this case, may break in upon the actual intention of the testator. I believe, he intended, that the same persons should take both these funds: yet it seems impossible upon fair judicial construction not to apply to the fund, which is to be distributed upon the death of Mary Baker, the rule, that must be applied to the copyhold estate; which is directly within the principle, upon which the rule is founded; that as many persons are to be comprehended, as may be, by looking to the period of distribution. The testator probably meant children at his own death: yet upon the authorities the will must be construed to mean such as should come into existence before the period of distribution; a rule, that is not to be shaken unless a time of distribution is expressly provided; excluding all, who may afterwards come into existence: not that the Court would not be inclined to comprehend them; but that the instant any of the children are to take

WALKER
 &
 SHORE.

the Court must decide, what children are to take that, which is to be distributed among them.†

[*126]

As to the Bank Stock, considering the rule, I think the distinction too thin, that the interest for life is not the gift of the testator himself. By that clause the testator appears to me to say, that, if the trustees could at his death apply the stock, or the money, produced by the *sale of it, as they could not, if Mary Baker was living, they were to apply it at that time; but if by her surviving him they could not then apply the fund, the period of distribution must in that instance also take in this after-born child.

The decree accordingly declared the defendant Felix Walker entitled to a thirteenth share of the funds under the will.

Sir Samuel Romilly applied for maintenance of the children of Richard Walker upon the affidavit of their mother, that her husband was in Sicily in very embarrassed circumstances: the share of each child not exceeding 300*l*. The interest was accordingly directed to be paid to their mother, and applied for maintenance until farther order.

1808.
 June 23.

CROCKFORD v. ALEXANDER.

(15 Vesey, 138—139.)

ELDON, L.C.
 [138]

Injunction against cutting timber in the case of trespass: viz. by a person, having got possession under articles to purchase.

Distinction between waste and trespass, or destruction; where there is no privity.

Writ of *estrepement* to prevent repetition of waste.

THE plaintiff having contracted to sell an estate to the defendant, the latter obtained possession from the tenant; and began to cut timber; upon which the bill was filed, and a motion made, for an injunction.

Mr. Cullen, in support of the motion, observed, that this was a case of trespass.

+ Ante, *Gilbert v. Boorman*, 8 R. R. Lord St. John, 7 R. R. 366 (10 Ves. 137 (11 Ves. 238); *Whitbread v.* 152).

THE LORD CHANCELLOR :

CROCKFORD

r.

ALEXANDER.

Although at law this defendant is a trespasser, he is in equity by the effect of the contract the owner of this estate; having taken possession under the contract; and the vendor is in the situation of an equitable mortgagee. This Court has occasionally granted an injunction in cases of trespass as well as waste; and, having thought much upon this subject, I will grant this protection against cutting timber, until the power of the Court to grant the injunction against trespass shall be fully discussed. Lord THURLOW refused the injunction in this case: a man, possessed of two fields, demised one, with the mines under it: the lessee found his way, working under ground, to the mines under the other field, which was not demised: Lord THURLOW held that to be trespass, not waste; and did not grant the injunction. There are however several cases, furnishing principles by analogy. In *Lord Byron's* case† it was destruction, not waste: there being no privity between Lord Byron and the persons, who had the mills. There is no difference between destruction, *and trespass, where there is no privity of estate; and at law the writ of *Estrepement* may be had to prevent repetition of waste. I have therefore ventured to grant an injunction in trespass; and this defendant will find it very difficult to maintain, that he can use his legal character of trespasser, in order to enable himself to commit what is absolute destruction.

[*139]

The order for the injunction was made.

† *Robinson v. Lord Byron*, 1 Br. C. C. 588.

STEVENS v. BAGWELL.†

(15 Vesey, 139—156.)

1808.

Jan. 25, 26,

27.

Aug. 5.

Rolls Court.

GRANT, M.R.

[139]

Probate of the will of a married woman, limited to her power, by the assent of her husband, with respect to any beneficial interest.

Assignment to Navy agents of part of the subject of a prize suit, then depending, void; amounting to champerty: viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it; which is not confined to courts of common law.

No interest completely vested in prize before condemnation: but upon condemnation it is considered the property of the captor from the time of the capture.

WILLIAM STEVENS by his will, dated the 28th of December, 1776, gave to his brother Thomas Stevens one quarter of the residue of his estate and effects: *to the plaintiffs Lawrence William Stevens and Sarah Burt, then Stevens, one other quarter, to be divided between them, share and share alike, when they should severally attain the age of twenty-one; or to the survivor of them; but, if both should die under that age, the testator gave the said quarter to his brother Thomas Stevens; and all the rest and residue of his estate and effects he gave to his sister Sarah Pearce, then the wife of Richard Pearce; and appointed her his executrix.

[*140]

The testator died in December, 1782. In July, 1781, having been appointed commander of his Majesty's sloop *The Nymph*, he was concerned in the capture of the Dutch Fort Chinsurah in the East Indies. A suit in the Admiralty Court, upon the legality of that capture, and the distribution of the prize money, was depending at the time of the deaths of the testator Lieutenant Stevens and of Richard and Sarah Pearce.

Marsh and Creed, agents for the captors, executed a bond dated the 19th of December, 1783, in the penal sum of 10,000*l.*; reciting an agreement by them, in consideration of having one fifth part of the money, that might be recovered for William Stevens's share, to indemnify Richard and Sarah Pearce from all costs and charges, that they might be liable to pay on account of any suit or appeals that might be brought, carried on,

† *Noble v. Willock* (1873-5) L. R. 591, 42 L. J. Ch. 681, 29 L. T. N. S. 8 Ch. 778 (see p. 790), 7 H. L. 580, 194.

or prosecuted, touching the said prize money; if such prize money should not be recovered; and reciting an assignment to Marsh and Creed, their executors, &c. of the same date, by Richard and Sarah Pearce, of one fifth part of all such prize money, &c. that was, or should, or might become, due to the estate of William Stevens; with condition to be void, if Marsh and Creed, their heirs, executors, &c. should indemnify Richard and Sarah Pearce, their heirs, executors, &c. and also the *estate and effects of William Stevens, from payment on account of any action, &c.; and, in case Marsh and Creed should recover or receive such prize money, within thirty days to account for and pay unto the said Richard Pearce and Sarah, his wife, their executors, administrators, or assigns, or such person or persons as should then be the legal representative or representatives as to the personal estate of the said William Stevens, four fifths of all such sums as should be recovered, &c.

STEVENS
v.
BAGWELL.

[*141]

Thomas Stevens died in December, 1787; having by his will, reciting his expectation of receiving a considerable sum under the will of his late brother, in case such sum should be received by his executors, disposed of it between the plaintiffs Stevens and Burt.

Richard Pearce by his will, dated the 23rd of January, 1789, after giving some legacies, bequeathed the rest and residue of his monies and securities for money and all his estate and effects whatsoever and wheresoever, after payment of his debts, &c. unto his wife Sarah Pearce, to and for her own use, benefit and disposal; and in case of her decease in his life-time, then he gave and bequeathed all the said residue of his estate and effects to the executors or administrators of his said wife; and he directed that the same shall be paid, transferred and divided, unto and amongst such person and persons, and in such proportion, manner, and form, as his said wife by her last will and testament in writing, or any writing, purporting to be her last will and testament, and to be executed by her either in his life-time or after his decease, should give, direct, or appoint, the same: it being his will and intention, that, in case his said wife should die in his life-time, or before he should alter his said will, then that the residue of his estate and effects, to her thereby given, should go unto, and be paid and applied, *as his said

[*142]

STEVENS
v.
BAGWELL.

wife should by her will, or any writing, purporting to be her will, have directed ; and he thereby authorized and empowered his said wife in his life-time to make any such will for the purposes aforesaid ; and he appointed Catherine Pearce, afterwards Wilkinson, and the defendant Bagwell his executors.

Richard Pearce died on the 28th of February, 1789. His wife survived him only twelve hours ; having made her will, of the same date with her husband's, and signed by him, as an attesting witness ; reciting his will ; and in pursuance of the power, thereby given to her, and all other powers, &c. as to such worldly estate and effects, whereof she might be entitled or possessed at the time of her decease, or over which she had any disposing power, she gave, directed and disposed, thereof, after bequeathing various pecuniary legacies, in the following manner :

“ As to all the rest, residue and remainder, of my estate and effects, whatsoever and wheresoever, and of what nature, kind, or quality soever, whereof I may be possessed, interested, or entitled unto at the time of my decease, or over which I have any power to dispose either by the will of my said husband or by or under the will of my late brother William Stevens, formerly a Lieutenant in his Majesty's navy, but now deceased, and in whose will I am named the residuary legatee, or by any other means whatsoever, after payment of my just debts, funeral expenses, and the charges of proving this my will, I give, bequeath, dispose and direct, the same and every part thereof unto the said Catherine Pearce, her executors and administrators, to and for her and their own use and benefit ; ” and she appointed Catherine Pearce and John Bagwell executors. The plaintiffs

[*143] Stevens and *Burt, and Susannah Scammell, deceased, were her next of kin at the time of her death.

In March, 1789, probate was granted of the will of Sarah Pearce ; but limited to all the right, title, and interest, of her Sarah Pearce in and to the residue, which by the will of her husband she had a power to dispose of, and had disposed of by her said will accordingly. In May, 1800, Catherine Wilkinson, formerly Pearce, and Bagwell, instituted a suit in the Ecclesiastical Court against the plaintiffs in this cause, Stevens and Burt, and Susannah Scammell, as next of kin of Sarah Pearce ; citing

them to shew cause, why the limited probate should not be revoked, and a general probate be granted ; but in Easter Term, 1801, a prohibition was granted by the Court of King's Bench ; and administration of the goods, &c. of Sarah Pearce, of which notwithstanding her said will she died intestate, was, upon the 29th of January, 1803, granted to the plaintiff Stevens.

STEVENS
v.
BAGWELL.

In January, 1805, the limited probate was revoked ; and a more extended probate granted ; limited not only to all the right, title, and interest, of Sarah Pearce in the residue, under the will of her husband, but also to the power, which she had of making a testament, and appointing executors of the goods, &c. which she had, as executrix of William Stevens.

In 1791 a decree of condemnation of the property captured at Chinsurah, was pronounced in the Court of Admiralty, as prize ; to be distributed in such manner as his Majesty should think fit ; which decree was, in 1792, affirmed on appeal.

In 1793 a warrant was granted by the Commissioners of the Treasury for payment of one moiety of the proceeds to Sir Edward Hughes and the officers and crew of *The Nymph*, or to their agents, lawfully authorized and appointed ; to be distributed in the established proportions. Another warrant, dated the 12th of July, 1796, ordered the payment to be to the representatives of Sir Edward Hughes and to the officers and crew of *The Nymph*. Under those warrants Bagwell received from Marsh and Creed four fifths ; and paid to the executors of Thomas Stevens the fourth, intended for him by the will of William Stevens.

[144]

A third warrant of the Treasury, dated the 17th of December, 1803, ordered the payment, directed by the former warrants, to be made to the representatives of Sir Edward Hughes, the representatives of William Stevens, and the representatives of such of the officers and crew of *The Nymph* as were deceased, conjointly with the survivors ; to be distributed in the manner directed by the two former warrants.

The bill prayed, that the plaintiffs, as the only next of kin of William Stevens and of Sarah Pearce at the determination of the suit in the Court of Admiralty, and at the time of granting the Treasury warrants, and as the legatees in the will of Thomas Stevens and Susannah Scammell, may be declared entitled to

STEVENS the whole of the prize-money of William Stevens; and that the
 v. assignment of Marsh and Creed may be declared void.
 BAGWELL.

The answer of Bagwell submitted, that the administration, granted to the plaintiffs, did not comprehend any property, which Sarah Pearce was entitled to under the will of William Stevens, but merely such as she became entitled to in her own
 [*145] right, after the decease of her *husband; and that under the extended probate the property of William Stevens became vested in the executors of Sarah Pearce, for the purposes of her will, and not for her next of kin.

Sir Samuel Romilly, Mr. Bell, and Mr. Girdlestone, for the plaintiffs:

The propositions, maintained by this bill are, 1st, That the representatives, under the warrant, granted by the Lords of the Treasury, were the next of kin, entitled by the statute: 2ndly, the moiety of the residue, taken by Sarah Pearce under the will of her brother Lieutenant Stevens, was not disposed of by her; and her next of kin therefore are entitled; as in a case of intestacy: 3rdly, that the assignment, obtained by the agents, of a fifth part of the prize-money is not a valid assignment.

With respect to the first point Lieutenant Stevens was not possessed of this property even at the time of his death. He had no interest, but at the utmost, an expectation, that the Crown would grant to him a share of that, which was vested entirely in the Crown: to be received, as a bounty: not claimed as a right. Until the warrant issued from the Treasury, there was no property any where but in the Crown. Then, the construction of that warrant, to pay to "the representatives" of Lieutenant Stevens, must be, as in the case of *Bridge v. Abbot*,† the next of kin, at that time.

If that should be determined against the plaintiffs, then, with regard to the next point, the Spiritual Court, and the Court of
 [*146] King's Bench, granting the prohibition, *have decided, that the will, made by Mrs. Pearce, has disposed of, not all her personal estate; but only what she had the power by the will of her husband to dispose of; or what she took as executrix of her

† 3 Br. C. C. 224.

brother. The moiety of the residue, bequeathed to her by the will of her brother, does not fall under either of those descriptions. * * She was therefore not entitled to dispose of that portion of the residue of her brother's personal estate, which she took, not as executrix, but absolutely ; as her own property ; as residuary legatee.

STEVENS
v.
BAGWELL.

3rdly ; As to the assignment of one fifth part of this fund to the agents, there is no case precisely like this : but it is within the general principle of public policy. There is no doubt, that a solicitor, or general manager and agent, would not be permitted to take from the client an assignment of a portion of the property in dispute in consideration of an indemnity against the costs ; and the Court will regard with great strictness such a transaction between prize-agents, and the persons, entitled to the prize : persons necessarily kept long in suspense ; and always considered as entitled to the peculiar protection, not only of courts of justice, but of the Legislature also. A prize-agent stands in a confidential situation ; which excites the greatest jealousy of a transaction, by which he takes an assignment of any beneficial *interest from those persons, whose concerns are entrusted to him. This appears a most extraordinary bargain : for a fifth of the whole of this very considerable property : the share of Lieutenant Stevens, after all deductions, exceeding 20,000*l.* : the agents deducting, 1st, their commission, upon the whole, to which he was entitled ; to the amount of 4,677*l.* ; then their bill for disbursements, &c. 6,512*l.* ; and after those deductions taking under this assignment of a fifth part of the balance 4,092*l.* ; aware, that they were acting for an executrix, entitled to a moiety of the property. It could not affect the fund farther than she was beneficially entitled : but upon the general principle such a transaction cannot possibly stand in a court of equity.

[*147]

Sir Arthur Piggott, Mr. Alexander, and Mr. Finch ; Mr. Richards, Mr. Thomson, and Mr. Clason ; Mr. Hart, and Mr. Raithby ; for the different defendants :

The last of these three grants cannot affect the rights, acquired under the two preceding grants ; the effect of which is, that the proportion of Lieutenant Stevens in this prize-money became

STEVENS ^{c.} his personal assets. By the first grants the power of the Crown was exhausted ; except to supply a defect in form ; to give farther effect to the grant ; but a new grant, inconsistent with the former, could not be made. * * Though, as against the Crown, no legal interest passes, until the grant is made, yet, when made, it has relation to the time of the capture. * * *

[148]

2nd. Upon the 2nd point, that Sarah Pearce, a married woman, died, without having made any will, except during her coverture, and therefore intestate, the will she made is a good will for the purpose of passing all her interest under the will of her brother. By that will she not only executes the power, given to her by the will of her husband ; but goes farther ; and to that excess she has his *assent ; which is all, that is required to give effect to the will of a married woman. * * *

[*149]

3rdly. As to the transaction with the agents, this bill was filed, after the money, received from them, had been distributed. * * This is no more than an insurance against the consequences of a suit, considered hazardous, in which Mr. and Mrs. Pearce were engaged. The principle, protecting a client, is confined to the case of a law agent, conducting a suit ; who, having the means of throwing obstacles in the way, is strictly watched ; and is not permitted to take more than his ordinary fees.

THE MASTER OF THE ROLLS :

Is not this what the law calls champerty ; a bargain for part of the subject, for which the parties are litigating in a court of justice ?

* * * * *

Sir Samuel Romilly, in reply. * * *

Aug. 5.

THE MASTER OF THE ROLLS :

[151]

The question in this cause is, to whose benefit the grant, made by the Crown, of the Chinsurah prize-money is to enure : whether for the benefit of the residuary legatees under the will of Lieutenant Stevens, or of his next of kin ; and, if for the benefit of the latter, whether of the next of kin at the time of his death, or of those, who answered that description at the time of the grant.

The capture of the fort of Chinsurah, in July, 1781, was made by *The Nymph* sloop of war, commanded by Lieutenant Stevens, under the orders of Sir Edward Hughes, and by a detachment of the East India Company's forces. If the captured effects had, after the death of Lieutenant Stevens, been condemned as prize to the captors, there can be no doubt, that his share would have passed by his will; as, though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture. The captured effects being condemned to the Crown, no right to any part of the produce can accrue to any one, except by the gift of the Crown; and, as Lieutenant Stevens died, before any gift was made, his will could have no direct operation upon the subject of that gift. But the intention of the Crown in all cases of this kind is to put what is in strictness matter of bounty upon the footing of matter of right. The service performed is thought worthy of reward; and, though the party performing it, died before payment, the claim of bounty from the Crown is considered as transmissible to his representatives in the same plight and condition as the claim for wages, or any other stipulated or legal remuneration of service. In such cases the Crown never means to exercise any kind of judgment or selection with regard to the persons to be ultimately benefited by the gift. The representatives, to whom the Crown gives, are those, who legally sustain that character: but the gift is made in augmentation of the estate; not by way of personal bounty to them. They take subject to the same trusts, upon which they would have taken wages, or prize-money, to which the party, from whom they claim, might have been legally entitled.

The representatives of Lieutenant Stevens were therefore entitled to receive this money; but upon the same *trusts as they would take his general estate; and this is to be considered, as if it had been actually a part of his property at the time of his death. The consequence is, that his residuary legatees were entitled to it.

As I hold this to be constructively, and for the purpose of regulating the trust upon the grant of the Crown, his property

STEVENS
BAGWELL.
[152]

[*153]

STEVENS
v.
BAGWELL.

at his death, it follows, that the right to the shares of those residuary legatees, who died after him, and before the money was received, must be regulated upon the same principle. His representatives must distribute this fund just as they would have been bound to distribute any other money, legally due to his estate, that they might have received, when this grant was made: consequently the share of Thomas Stevens will be governed by the disposition made by his will.

A question arises with regard to the effect of this principle as to Mrs. Pearce's share of the residuary estate. It is contended on the one hand, that it is to go according to her will: on the other, that it belongs to her next of kin. The Court considers, that instrument only, of which probate has been granted, as her will: for, though formerly it was held, that the will of a married woman, not only need not, but ought not, to be proved, and that the probate was of no authority, yet it is now settled, that neither courts of law, nor courts of equity, will act upon such will, if it has not been first proved in the Ecclesiastical Court. In *Stone v. Forsyth*† Lord MANSFIELD says, if the Ecclesiastical Court will not grant probate, the remedy is an appeal to the delegates.

[*154] My opinion is, that the will of Mrs. Pearce, as proved, would not have affected her share of the actual residuary *estate of Lieutenant Stevens; and consequently I cannot adopt it as the rule for guiding the trust of that, which I hold was only constructively part of his residuary estate. She was married, when her will was made. Her husband had bequeathed to her all the residue of his property, and upon her death to her executors; and empowered her to make a will, or writing purporting to be a will, as to that residue. Mrs. Pearce, professing to act upon and under that authority, made a will: but by that will she disposed, not only of what her husband had given to her, his residuary estate, but also of all the rest, residue, and remainder, of her estate and effects, whatsoever and wheresoever, and of what nature, kind, or quality, soever, whereof she might be possessed, &c. or over which she had any power to dispose either by the will of her husband, or under the will of her brother, or by any other means whatsoever.

† Doug. 707.

In March, 1789, a limited probate of that will was obtained from the Spiritual Court. The probate, which issued, was limited to the right, title, and interest of her Sarah Pearce, in and to the residue, which by the will of her husband she had a power to dispose of, and hath disposed of by her will accordingly.

STEVENS
v.
BAGWELL.

It is observable, that the Spiritual Court take no notice of, and place no reliance upon, the circumstance, upon which some stress was laid in the argument: viz. that her husband was one of the attesting witnesses to her will. They refer only to the authority she derived from his will; and limit the probate to the interest which she took under that will. They do not grant the probate even to the extent of the nomination, which she had made, of executors; no notice is taken of that nomination.

Her executors, dissatisfied, as it seems, with this limited probate, applied for a general probate. An application was made to the Court of King's Bench for a prohibition.† It was there held, that the Spiritual Court ought not to grant a general probate: but the Court thought, the probate granted was more limited than was necessary; for they say‡ that, as Mrs. Pearce, besides what she could dispose of by the will of her husband, to which the limited probate is confined, had a power to make a testament, and appoint an executor, of the goods she had as executrix, to which that probate does not extend, the probate, to be granted in this case, may be more extensive than what the plaintiffs insist it should be.

[155]

After that decision Lawrence William Stevens applied to the Ecclesiastical Court for the administration of such of the effects of Mrs. Pearce as did not pass by her will; which was granted. He applied also for administration to the estate of William Stevens with the will annexed; contending, that in the event, which had happened, William Stevens had now no personal representative. This demand was resisted by the executors of Mrs. Pearce; and their proctor denies, that there is not now any representative of William Stevens; as his said party, viz. the executors of Mrs. Pearce's will, are at present the personal representatives of William Stevens.

† *Scammell v. Wilkinson*, 2 East, 552.

‡ 2 East, 548.

STEVENS
r.
BAGWELL.

[*156]

After much pleading and contention, the sentence rejected the petition of the proctor for Lawrence William Stevens; praying administration to Lieutenant Stevens's will; and made this addition to the former probate of Mrs. Pearce's will: viz. so far as respected the power she had of making a testament and appointing executors. As to William Stevens the Court of King's Bench thought, *the power of continuing the representation vested in her by law without any authority from her husband; and to that power the Ecclesiastical Court refer; for her husband had not professed to give it to her.

My opinion is, that this will of her's had no operation whatsoever, except to pass what she took under her husband's will, and to transmit the representation to William Stevens to her own executors: that is, it passed the legal rights, but not the beneficial interest she had under that will, as residuary legatee. Her right therefore in that respect passes, as if she had died totally intestate; viz. to her next of kin at the time of her death; and, upon the principle I before laid down, the same next of kin are entitled to that; which I hold to be constructively of the nature of residuary estate.

This disposes of all the questions; except that touching the agreement of Mr. and Mrs. Pearce with Marsh and Creed. I expressed at the hearing my opinion, that the agreement was void from the beginning; as amounting to that species of maintenance, which is called champerty: viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it. In the case of *Wallis v. The Duke of Portland* † Lord LOUGHBOROUGH held, that this offence is not confined to courts of common law. Independently of the illegality of this agreement, the case has not existed, in which the agreement was to take effect; as the property has not been recovered in that suit. The captors failed: the decree was against them; and the property has been derived from a different source, and under a different title. The right to the property therefore either way is totally unaffected by this agreement; and must be declared according to the opinion, that I have delivered.

† 4 R. R. 78 (3 Ves. 494).

ST. PAUL *v.* VISCOUNT DUDLEY AND WARD.

(15 Vesey, 167—174.)

1808.
June 29.

ELDON, L.C.

[167]

Copyhold premises, purchased by the lord, tenant for life of the manor, with remainders over, taking the surrender to him and his heirs, merge; and, as parcel, are subject to the limitations of the manor; and, though under a covenant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs, the mortgagee could compel a re-grant by the remainder-man, no re-grant having been made, the general devisees of the purchaser have no equity.

JOHN, late Viscount Dudley and Ward, was under the will of his father seised of the manors of Sedgley and Kingswinford for life; with remainders to the devisor's younger son, the defendant William Lord Dudley and Ward, and to his first and other sons in the usual course of settlement; and the ultimate remainder to the devisor's right heirs.

On the 30th of May, 1775, in pursuance of an agreement by John Lord Dudley and Ward to purchase copyhold lands, situated within the manor of Sedgley, Jonas Clarke and Ann, his wife, surrendered to the use of Lord Dudley and Ward, his heirs and assigns, for ever.

By articles of agreement, dated the 12th of June, 1779, Thomas Newton covenanted in consideration of 1,500*l.* to convey freehold lands within the manor of Kingswinford, and to surrender copyhold premises to the use of Lord Dudley and Ward, his heirs and assigns, for ever; which conveyance and surrender, &c. were made accordingly. Lord Dudley and Ward was never admitted to the copyhold lands which he had purchased. *By indentures, dated the 25th and 26th of January, 1781, he conveyed freehold lands, and covenanted to surrender the copyhold premises, which he had purchased, within the manor of Kingswinford, to the use of Jacob Smith and his heirs; to secure the re-payment of 8,000*l.*, advanced by Smith; subject to a proviso for re-conveying and surrendering, upon payment by Lord Dudley and Ward, his heirs, executors, &c. to Smith, his executors, &c.

[*168]

Lord Dudley and Ward by his will, dated the 6th of July, 1788, and duly attested, gave and devised all his messuages, lands, tenements, and hereditaments, and real estate, of which

ST. PAUL
v.
VISCOUNT
DUDLEY and
WARD.

he was then seised, or entitled in law or equity, or had power to dispose of, to the plaintiffs: upon trust by sale or mortgage to pay his debts and legacies, and in the mean time out of the rents and profits to pay the interest of that mortgage debt, and, subject thereto, for the plaintiff, his natural daughter, and her children in strict settlement.

The testator John Lord Dudley and Ward died soon afterwards; leaving no legitimate issue. His brother, the defendant William Lord Dudley and Ward, was his heir at law. An assignment of the mortgage of 1801 was executed to Joseph Smith; reciting, that the copyhold premises within the manor of Kingswinford were never surrendered; and by deed poll, indorsed upon the mortgage deed, it was declared, that the sum of 8,000*l.*, advanced upon that mortgage, was the money of the plaintiff Mrs. St. Paul, daughter of the testator John Lord Dudley and Ward; and that Smith's name was used only as a trustee. She married in 1803; and had one child.

[*169]

The bill prayed, that the defendant, William Lord Dudley and Ward, may be declared a trustee for the plaintiffs with respect to the premises within the said *manors, purchased by the late lord; and that he may be decreed as lord of the manor, to grant; and may be restrained by injunction from taking execution under a judgment in ejectment; suggesting, that the defendant insists, that by the effect of the surrenders the premises became parcel of the manors, of which they were respectively held; and passed therewith to the defendant under the will of his father; and charging, that it appears from the surrenders having been made to John Lord Dudley and Ward, his heirs and assigns, that it was his intention to exclude William Lord Dudley and Ward and those in remainder and reversion from taking the benefit thereof; and therefore the defendant is to be considered as a trustee for the plaintiffs, the devisees in trust under the will of John Lord Dudley and Ward; insisting, that the covenant, entered into by John Lord Dudley and Ward, to surrender the premises within the manor of Kingswinford to Jacob Smith, to secure 8,000*l.*, is to be considered as equal to a covenant to exercise his power of re-granting the premises, as copyholds.

Mr. Richards, Mr. Hart, and Mr. Newland, for the plaintiffs:

ST. PAUL
C.
VISCOUNT
DUDLEY and
WARD.

Lord Dudley and Ward, tenant for life of the manor of Sedgley, with remainders over, having taken a surrender to him and his heirs of copyhold premises within the manor, any slight act is sufficient evidence of his intention to pay the money for his own benefit, and keep the incumbrance alive. It is extraordinary to suppose him not to have intended to keep the purchase distinct from the manor. Upon that supposition the natural course would have been to take the surrender according to the limitations of the manor; instead of taking it to himself and his heirs. The plain conclusion from that circumstance is, that this copyhold estate was not to merge in the manor; *and that in equity it should be considered his property; as if he had taken the surrender to a trustee in trust for himself.

[*170]

The question as to the estate in the manor of Kingswinford is different. The mortgagee, having contracted for valuable consideration with a person, who had the power to make a re-grant of these copyhold premises, was entitled to compel the remainder-man to make it; according to the equity, which prevailed in the case of *Shannon v. Bradstreet*.† * * *

* * This case has analogy to that of tenant for life paying off an incumbrance.

[171]

Sir Samuel Romilly, and Mr Heald, for the defendant :

The equity, now set up, is perfectly new. The late Lord Dudley and Ward might have taken a surrender of this copyhold originally, or, having it extinguished for a time, he might have made a grant to another person, in trust for himself. Instead of taking either course, he permits it during his whole life to remain extinguished. * * *

THE LORD CHANCELLOR :

[172]

As to the premises in the manor of Sedgley, the case is simply this. Tenant for life of the manor takes a surrender of a copyhold to him and his heirs. The legal effect of that is, that the property becomes parcel of the manor. It is said, that an equity arises out of the transaction, and the fact, that the tenant for

† 9 R. R. 11 (1 Sch. & Lef. 52).

ST. PAUL
 V.
 VISCOUNT
 DUDLEY and
 WARD.

life paid the money for the inheritance, that those, who are entitled to the manor in remainder, shall be considered as trustees of that copyhold estate for him. The fact of payment of the money constitutes a case very clear. It is no more than the lord buying the copyhold; and in the act of buying destroying the copyhold. That has been long familiarly known; and I never before heard this equity stated. The actual intention may probably be defeated. In the case, that has been cited by *Sir Samuel Romilly*, of the devise of a manor, the devisor afterwards purchasing a copyhold within it, he probably did not intend it to pass by the will: yet the Court of King's Bench held, that it did pass.

[*173]

It has been said, that this is analogous to the case of tenant for life, paying off an incumbrance. It is so in *this respect. If the tenant for life at the time he pays off the debt in that transaction, merges the security by taking an assignment, connecting it with the legal estate of inheritance, upon that transaction, *primâ facie*, there is no charge. With regard to tenant in tail the presumption is, that, whether he takes an assignment, or not, as he represents the inheritance, the debt is gone; and there is no charge; unless there is evidence of an intention, that it should continue an incumbrance. As far as analogy goes, if the copyhold premises by the effect of the legal conveyance become parcel of the manor, the case of the tenant for life is rather against, than in favour of the claim.†

The case as to the other premises is more difficult. They became parcel of the manor. The tenant for life might have re-granted them; and it is true, that, if tenant for life of a manor, having a power to grant, covenants to make such a grant, that would in equity bind the remainder-man: being in the nature of an execution of a power. But here, after this copyhold became parcel of the manor, Lord Dudley and Ward made a mortgage of freehold estates; and covenanted to surrender this copyhold; which, as far as the deed is evidence, he then thought was copyhold; and it is not a stretch to deal with the estate, as he could; in order to give the mortgagee the substantial benefit of his contract. A court of equity therefore would compel the lord to re-

† See 2 R. R. 101 (1 Ves. J. 227).

grant by copy ; which must be to A. and his heirs according to the custom ; and it could not be consistent with the intention to keep the copyhold alive, that the incumbrancer, when paid, was to surrender to him and his heirs ; as the effect of that surrender would be again to make the copyhold parcel of the manor. The question then as to the premises in the manor of Kingswinford is simply, whether this Court will call upon the remainder-man to make good *this mortgage, not at the instance of the mortgagee, but in favour of a third person ; claiming, not as mortgagee, but what might, or might not, have been the effect of a re-grant to the mortgagee ; if in execution of the contract with him that re-grant had been made. That re-grant might have been made without giving any interest to these plaintiffs. My opinion therefore is, that the plaintiff has no equity.

ST. PAUL
V.
VISCOUNT
DUDLEY and
WARD.

[*174]

The bill was dismissed.

CRAWSHAY v. COLLINS.†

(15 Vesey, 218—230.)

1808.
July 25, 26.

A partnership being dissolved by the bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bankruptcy.

ELDON, J.C.

[218]

As far as the profits may have been produced by a joint application of that and other funds, *quære*.

In September, 1801, Collins, Noble, and Boughton, entered into partnership in the business of pump and engine manufacturers. In December, 1803, a commission of bankruptcy issued against Noble. In August, 1804, this suit was instituted upon a bill, filed by the assignees under that commission against Collins and Boughton ; stating, that a patent was granted in 1799 to Noble for a certain apparatus to be applied to the working of pumps, engines, &c. ; that another patent was granted in 1800 to the defendant Collins, for improvements in the application of metals or metallic mixtures, as a substitute for iron, in

† See The Partnership Act, 1890, s. 8 Ch. 328, 7 H. L. 338; *Yates v. Finn* 42 (1); *Vyse v. Foster*, (1872-4) L. R. (1880) 13 Ch. D. 839.—O. A. S.

CRAWSEY
v.
COLLINS.

several parts of chain pumps ; that the expenses of soliciting the said patents were defrayed out of the said partnership funds of Collins & Co. ; that no articles were entered into as to the term or continuance of the partnership ; stating the shares and terms, upon which they had verbally agreed ; that the partnership entered into a contract with the Navy Board to supply the navy with pumps, &c. ; determinable on six months' notice ; which contract had not been determined ; and that, besides the profit, made under that contract, they carried on a very extensive business as pump and engine makers ; but no account had been settled.

[*219]

The bill prayed, that the plaintiffs, as assignees of Noble, may be declared entitled to three eighth parts of the profits, which have arisen, and which shall arise, from carrying on the said co-partnership business, and which remained unaccounted for to Noble at the time of his bankruptcy ; or have accrued since ; and also to three *eighth parts of the said patents, and to all profits and emoluments to arise therefrom ; and that the said three eighth parts thereof may be sold for the benefit of the bankrupt's estate ; an account of all dealings and transactions, &c.

The decree, made on the 5th of August, 1805, directed an account of all dealings and transactions in partnership between Noble and the defendants down to the 7th of October, 1803, the time of Noble's bankruptcy : without prejudice to the question, whether the plaintiffs, as assignees of Noble, are entitled to a share of the profits of the partnership business, subsequent to the 7th of October, 1803. The Master's report stated, that the defendants and the bankrupt carried on the business of pump and engine makers, in partnership from September, 1801, previous to which time the said business had been carried on by Noble and Collins in partnership with other persons ; that the business was carried on in leasehold premises ; and it was agreed at the commencement of the partnership, that the capital of their trade, consisting of the said leasehold premises, the tools and utensils of the trade, and the money, then advanced by the partners severally, should be estimated at 5,333*l.* 6*s.* 8*d.* ; of which three eighth parts, being 2,000*l.* were to be considered as the share of Collins : three other eighth parts as the share of

Noble : and the remaining two eighth parts as the share of Boughton. The capital was afterwards reduced by agreement ; and the clear profits of the trade to the 7th of October, 1803, were estimated at 3,053*l.* 2*s.* 0½*d.* ; of which Noble's share amounted to 1,144*l.* 18*s.* 3¼*d.* The stock in trade and capital of the partnership on the 7th of October, 1803, consisted of the leasehold premises, where the trade was carried on, with the tools and implements and goods, manufactured and unmanufactured : the whole valued *at 3,053*l.* 8*s.* 0½*d.* : whereof three eighth parts, for the share of Noble, amounted to 1,145*l.* 0*s.* 6*d.* [*220]

CRAWSHAY
v.
COLLINS.

The cause came on for farther directions.

Sir Samuel Romilly, Mr. Hart, and Mr. Cooke, for the plaintiffs :

The plaintiffs are entitled to an account of the profits of their capital, used and hazarded in the trade, carried on by the defendants. The case of *Hill v. Burnham*† is a direct authority upon the point : the plaintiff married one of the daughters of the testator ; by whose death the partnership between him and the defendant was dissolved : the defendant, who was the executor, having continued to carry on the trade with the same capital, your Lordship declared, that, the testator's trade having been carried on after his death with his capital, the plaintiffs were with his other children entitled to the profits in proportion to the shares they were respectively entitled to in his personal estate. Bankruptcy certainly puts an end to a partnership : but the consequences would be most mischievous, if the solvent partners are at liberty to carry on the trade for their own benefit with the property, and at the risk, of the bankrupt. The principle has been acted upon in innumerable cases. In the instance of an executor or trustee, employing the trust money in his trade, the *cestui que trust* has an option to have interest, or the profit made.

Mr. Alexander, Mr. Leach, Mr. Roupell, for the defendants :

The proposition, maintained by this bill, is equally contrary to principle, the interests and practice of traders, *and the under- [*221]

† In Chancery, 25th November, 1805. Register's book, A. 1805, folio 425.

CRAWSHAY
v.
COLLINS.

standing and feelings of mankind: amounting to this; that, if one partner becomes bankrupt, and the assignees under his commission are so negligent as not to call for an account, and a sale, of his interest, they may afterwards compel the other partners to account for all the subsequent profits of the trade, carried on with labour, capital, and risk. Upon what ground can these assignees be considered partners in this trade: a manufactory of pumps for ships? The patent, taken out in Noble's name, though with the partnership funds, was never used to any extent; and Noble, who had stipulated to employ his skill, withdrew from the business. The argument with reference to that therefore fails. The assignees were bound to call for an account immediately. That proportion of the capital could not be considered as capital, to be employed in the trade of the remaining partners. It was not their capital, employed, in any sense. This cannot be compared to the case of executors, or trustees. The remaining partners were not trustees for these assignees, but debtors to them, liable to account in equity. The ground of a claim of partnership must be either the application of skill, or capital in its proper sense; not a mere debt, or liability. These assignees cannot be represented as making themselves personally liable for the adventure, as they might do certainly: but that purpose must be signified. * * *

[223]

Sir Samuel Romilly, in reply:

[224]

* * This is not modern doctrine. In the case of *Brown v. Litton*† Lord HARCOURT expressly declares his opinion,‡ that if one of two joint traders dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade: to the same effect as your Lordship's decision in *Hill v. Burnham*; § without the circumstance, which can make no difference, that the surviving partner was the executor. In that case the executor is under peculiar hardship. He cannot settle with himself; and therefore cannot, as another partner may, having settled it, buy the property himself. * * *

† 1 P. Wms. 140.
1 P. Wms. 141.

§ In Chancery, 25th of November,
1805.

THE LORD CHANCELLOR :

CRAWSHAY

COLLINS.

[223]

I cannot adopt the principle, upon which this case has been put for the defendants; depending upon what is conceived to be the understanding, feelings, and interests, of traders and of mankind upon this subject. I must act upon the law, as it is understood in this Court; however inconsistent it may be with those interests and feelings. If my opinion was, that in no possible circumstances any account of the profits is to be given, that would dispose of the case against the plaintiffs: but, if there is a possible case, in which they may have a claim to profits, though there may be many other cases, in which they *cannot claim, yet upon this record I have no intimation whatsoever, how the profits, if any, have been made; by what application of the funds, stated in the report, either alone, or combined with other funds, any and what profits have been made, no information is given. The profit may have been made by one simple sale and conversion of the capital, existing at the time of the bankruptcy. Nothing is stated of debts, due to the trade, or advances by these parties; whether from their private funds, or from the conversion of the stock.

[*226]

Partnerships are regulated either by the express contract, or by the contract, implied by law from the relation of the parties. The duties and obligations, arising from that relation, are regulated, as far as they are touched, by the express contract: if it does not reach all those duties and obligations, they are implied, and enforced by the law. In the instance of a partnership, without articles, the respective proportions of capital contributed by the partners, and the trade being carried on either for a certain period, or the connection dissolvable at pleasure, the time being expired, or, in the other case, notice to determine being given, it cannot be contended, that, if the remaining partners choose to carry on the trade, they can consider the whole property as their own; to be taken at such valuation, as they think proper to put upon it. That is not the law. The obligation implied among partners is, that they are to use the joint property for the benefit of all, whose property it is.

Many complicated cases may arise. There may be a partner-

CRAWSHAY
v.
COLLINS.
[*227]

ship, where, whether the parties have agreed for the determination of it at a particular period, or not, engagements *must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that for the purpose of making good those engagements with third persons it must continue; and then, instead of being, as it was, a general partnership, it is a general partnership determined except as it still subsists for the purpose only of winding up the concerns. Another mode of determination is, not by effluxion of time, but by the death of one partner; in which case the law says, that the property survives to the others. It survives as to the legal title in many cases; but not as to the beneficial interest. The question then is, whether the surviving partners, instead of settling the account, and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property; do what they please; and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained in the way, in which it can be best ascertained, by sale. * * *

[228]

As to the case, now before the Court, of the bankruptcy of one partner, supposing it the simple case of profit made by the mere sale of the property, there must be an account. It is said, a duty was imposed upon the assignees to call for the account. That is true. It is farther urged, that they could not be traders in new adventures. That also is in a sense true: but the proposition would be rash, that there can be no case, in which they could trade with consent of the creditors, or of the creditors and the bankrupt together. If they had the consent of all persons interested, I do not know, that other persons, with whom they might deal, could make the objection. The duty is not as between them and the other persons; who are not properly to be termed remaining or surviving partners: the destruction of one being, unless it is otherwise provided, a dissolution of the whole partnership; as if by effluxion of time, or by death; except as it may be reasoned upon the effect in bankruptcy of the substitution of assignees. *It is however no more the duty of the assignees

[*229]

to settle with the others, than it is their duty to settle with the assignees.

CRAWSHAY
P.
COLLINS.

* * The question then is, whether the other partners have a right to carry on the trade, become theirs exclusively, with the property belonging to the former partner ; considering the profit as exclusively their own ; and in that concern unquestionably hazarding the loss of that property ; if not implicating personal responsibility, indisputably in the course of that trade exposing that property to hazard. It is contended by the defendants, that, if they dealt only with this property, receiving the money, and turning it, as they do in trade, the demand is only to the extent of a third of the money, made by the first sale. That would give the right to an account to that extent : but there may be a more complicated case ; upon the application of funds of their own, mixed with the partnership property. How far the principle is applicable to the case of persons, so mixing, and applying, property of their own, is a consideration, with which I should deal at much hazard, when not apprised of the actual circumstances of the case now before me.

I cannot go the length of holding, that there may not have been profits, in which these assignees are not entitled to participate. I will not say, that they have a right to participate in all the profits that have been made. I shall therefore direct an inquiry to ascertain, whether the profits, that have been made, were made by any and what application of the funds which the report states as constituting the capital in October, 1803 ; or by the application of any other and what funds ; and with a direction to the Master to state the circumstances, with reference to profit made by the contract with government. My present notion, without prejudice, is, that the defendants have a right to put it to the plaintiffs to take to that contract, or to decline it : but if they choose to take to it, the others cannot prevent them.

[230]

The decree accordingly directed an inquiry, whether there were any and what profits made since the 7th of October, 1803, by any and what use or application of, or by means of, the stock in trade and capital of the partnership business ; as the Master finds the same to have been constituted ; with liberty to state specially any

CRAWSHAY
v.
COLLINS.

circumstances relative to the stock and capital existing on the 7th of October, 1803, or as to any profit, made since, or as to any contract with government, or as to the patents, or any profits, made from such contracts, or by the use of the said patents.

Note.—Further reports of this case at later stages of the inquiry will be found in 1 J. & W. 267, and 2 Russ. 325. The plaintiffs eventually, as late as 1826, established their claim to three-eighths of the profits made subsequently to the bankruptcy. Some incidental points arising upon an abortive reference to arbitration, and in no way illustrating the main subject-matter, are reported in 1 Swanst. 40 and 3 Swanst. 90.—O. A. S.

1808.
June 27.
Aug. 8.

Rolls Court.
GRANT, M.R.
[248]

LESTER v. GARLAND.†

(15 Vesey, 248—258.)

Bequest of residue, in trust, in case A. shall within six calendar months after the testator's decease give security not to marry B. then, and not otherwise, to pay to the children of A.; with a proviso to go over, if she shall refuse or neglect to give such security.

A condition precedent. The six months are exclusive of the day of the testator's death: therefore; as he died on the 12th of January, between eight and nine in the evening, a security given on the 12th of July, about seven in the evening, was held sufficient.

No general rule, in computing time from an act or an event, that the day is to be inclusive or exclusive; depending on the reason of the thing, according to the circumstances.

Our law rejects fractions of a day more generally than the civil law.

SIR JOHN LESTER by his will, dated the 25th of December, 1804, after several dispositions, gave and bequeathed all the residue of his personal estate to trustees; upon trust, that in case his sister Sarah Pointer shall not intermarry with A. before all or any of the shares, hereinafter given to her children, shall become payable, and in case his sister shall within six calendar months after his decease give such security as his trustees or the survivor, &c. shall approve of, that she will not at any time intermarry with A. or, in case she shall so intermarry with him after the periods, when all or any of the shares, hereinafter bequeathed to her children, shall become payable and shall be

† *Re Railway Sleepers Supply Co.* (1885) 29 Ch. D. 204, 205.

paid to him, her, or them, that she will within six calendar months after such marriage pay the amount of such share or shares, or cause any child or children, who shall have received his, her, or their, share or shares, to refund the same to the trustees, then, and not otherwise the trustees were directed to pay such residuary estate to the eight children of Sarah Pointer, at the age of twenty-one, or marriage, with benefit of survivorship; with a proviso, that in case his said sister shall intermarry with A. before all or any of the shares of her said children shall become payable, as aforesaid, or shall refuse or neglect to give such security, as aforesaid, then and in either of the said cases he directed the sum of 1,000*l.* a-piece only with *interest from his death or failure of his issue, as aforesaid, to be paid to the children of his sister; and, subject thereto, gave his residuary estate to the children of his other sister Amey Garland.

LESTER
F.
GARLAND.

[*249]

The testator died upon the 12th of January, 1805, between the hours of eight and nine in the evening. On the 12th of June the trustees gave to Mrs. Pointer notice, to give the security, required by the will, on or before the 12th of July. Mrs. Pointer on the 19th of June gave a written notice to the trustees, that she would give no security: but on the 6th of July she gave another notice in writing; desiring to know the nature and extent of the security required; declaring, that she was then willing to give them her bond; which was the only security she had to offer. In consequence of that communication on the 11th of July the solicitor for the trustees called upon her for the purpose of agreeing on the terms of the bond; when she requested farther time: but afterwards by a written notice, dated on that day, she refused to execute. On the next day however, the 12th of July, upon the remonstrances of the solicitor for the trustees, she did execute the bond about seven o'clock in the evening. On the same evening two of the trustees declared their approbation of the security: but the approbation of the third, being at Bristol, could not be obtained until some time afterwards: Mrs. Pointer having executed the bond at her residence in the neighbourhood of Poole.

The bill was filed by the infant children of Amey Garland, claiming under the forfeiture; upon the ground, first, that after the notices, given by Mrs. Pointer upon the 19th of June and the

LESTER 11th of July, she could not retract; secondly, that the security
 v. GARLAND. was not executed within the time.

[250] *Mr. Richards, Mr. Alexander, and Mr. Daniel, for the plaintiffs, [cited The King v. Adderley,† Clayton's case,‡ Bellasis v. Hester,§ Castle v. Burditt,|| and other cases.]*

Mr. Thomson and Mr. Roupell, for the defendants, the children of Mrs. Pointer: Sir Samuel Romilly; Serjeant Palmer, and Mr. Newbolt, for the trustees:

[251] * * Where the act is to confer an interest, or to give an enlarged or more beneficial enjoyment, the day is to be taken either inclusive, or exclusive. * * The period of six months in the case of lapse to the ordinary is exclusive of the day of avoidance;¶ and upon the statute of *Edward I.†† as to alienations in mortmain, the year is exclusive of the day. * * The general principle being against the fraction of a day, the computation, most material, and most likely to fall in with the general transactions of mankind, is to begin from the last moment of the day, rather than from the first. If the direction had been to do an act within one day after the testator's death, could the day, on which *he died, be possibly considered as that day, on which the act must be done? If this testator had died at the hour of eleven at night: could the remaining hour be accounted a day, consistently with the declared intention to allow the full period of six calendar months? [They cited *Pugh v. The Duke of Leeds* ‡‡ and other cases.]

*Mr. Richards, in reply. * * **

THE MASTER OF THE ROLLS:

The question in this cause is, whether Mrs. Pointer within six calendar months after the decease of her brother gave the security, required by his will, as the condition, upon which her children should take the benefit of his residuary estate. He died upon the 12th of January, 1805, at a quarter before nine o'clock in the evening. The security required was executed upon

† Doug. 463, 2nd ed.

‡ 5 Co. 1.

§ 1 Lord Raym. 280.

|| 3 T. R. 623.

¶ 2 Black. Com. 276.

†† Stat. 7 Edw. I.

‡‡ Cowp. 714.

the 12th of July following, about seven in the evening. Computing the time *de momento in momentum*, six calendar months had not elapsed; but it is admitted, that this is not the way, in which the computation is legally to be made. The question is, whether the day of Sir *John Lester's death is to be included in the six months, or to be excluded: if the day is included, she did not, if it is excluded, she did, give the required security before the end of the last day of the six months; and therefore did sufficiently comply with the condition.

LESTER
v.
GARLAND.

[*254]

It is said for the plaintiffs, that upon this subject a general rule has been by decision established; that, where the time is to run from the doing of an act, (and for the purpose of this question it must extend to the happening of an event) the day is always to be included. Whatever *dicta* there may be to that effect, it is clear, the actual decisions cannot be brought under any such general rule. The presentment of a bill of exchange to the sight of the drawee is an act done; and yet it is now settled, that the day, upon which it is presented, is to be excluded; though it had been ruled otherwise by three Judges of the Court of Common Pleas against the opinion of TREBY, Chief Justice. But the law is now clearly settled against that decision. The Annuity Act † provides, that the twenty days shall run from the execution of the deed. The execution of the deed is undoubtedly an act done: yet according to the decisions the day, upon which the deed was executed, is excluded. So, in a case in the House of Lords, in 1796, in which I was counsel, *Mercer v. Ogilvie*, where the question was, whether within the meaning of the Act of Parliament in Scotland ‡ “for regulating deeds done on death-bed” a man had lived sixty days after the making and granting of the deed, it was held, that the day, on which the deed was made and granted, was to be excluded.

In the cases of alienation in mortmain the alienation is an act done; and yet according to a case in Brooke *the day is excluded in the computation of the year, which the immediate lord has to enter for the forfeiture. Mr. Justice BLACKSTONE lays down, that the day of the avoidance of a living, which

[*255]

† Statute 17 Geo. III. c. 26. Repealed by statute 53 Geo. III. c. 141.

‡ 1696, c. 4.

LESTER
v.
GARLAND.

must be by an act done or an event happening, is excluded in the computation of the six months, which the patron has to present. I do not however find that position in the Second Institute, to which the learned Judge in his Commentaries refers.

[The MASTER OF THE ROLLS then referred to the cases cited for the plaintiff and continued:]

[256]

Upon these cases *Mr. Serjeant Palmer* made an observation, that applies correctly to all of them, except the first; † viz. that the act done, from which the computation is made inclusive of the day, is an act, to which the party, against whom the time runs, is privy; and, as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time allowed him: whereas in this case the event was one totally foreign to the party, whose time for deliberation was to begin to run from that event. *Mrs. Pointer* could not reasonably be supposed to have any opportunity of beginning on the day of *Sir John Lester's* death the deliberation, which was to govern the election, ultimately to be made. In the case of a notice of an action, to be brought, the party necessarily knows the time, at which he is served with the notice; and may immediately begin to consider of the propriety of preventing the action by tendering amends. So, a person arrested may immediately set about endeavouring to procure bail; and the same observation applies to the cases of the man robbed and of continual claim. But one is not necessarily conscious of the death, still less of the contents of the will, of another. Here, though it is impossible consistently with the words of the will to postpone the commencement of the time until the period of actual notice, yet it is not reasonable to include a day, useless to *Mrs. Pointer* for the purpose of deliberation; unless there is some clear, imperative, rule, making it absolutely necessary. She had a very important choice to make: one way debarring herself of her natural right of marrying whom she pleased: the *other excluding her children from a considerable fortune. That is not a case for narrowing the time allowed, for the decision.

[*257]

† *The King v. Adderley.*

It is not necessary to lay down any general rule upon this subject: but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referrible to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed. This reasoning was adopted by Lord ROSSLYN and Lord THURLOW in the case before mentioned of *Mercer v. Ogilvie*. The ground, on which the judgment of the Court of Session was affirmed by the House of Lords, is correctly stated in the fourth volume of the Dictionary of the decisions of the Court of Session. In the present case the technical rule forbids us to consider the hour of the testator's death at the time of his death; for that would be making a fraction of a day. The day of the death must therefore be the time of the death; and that time must be past, before the six months can begin to run. The rule, contended for on behalf of the plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead upon the 11th, instead of the 12th, of January; for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be *no alternative but either to take, the actual instant, or the entire day, as the time of his death; and not to begin the computation from the preceding day.

LESTER
v.
GARLAND.

[*258]

But it is not necessary to lay down any general rule. Whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made. Here the reason of the thing requires the exclusion of the day from the period of six months, given to Mrs. Pointer to deliberate upon the choice she would make; and upon the whole my opinion is, that she has entered into the security before the expiration of the six months; in sufficient time therefore to fulfil the condition, on which her children were to take.

1808.

Aug. 5, 6, 8, 9.

ELDON, L.C.

[258]

CHURCH *v.* BROWN.†

(15 Vesey, 258—273.)

Under an agreement for a lease the lessor is not without express stipulation entitled to a covenant, restraining alienation without licences as a proper and usual covenant.

THOMAS WORSFOLD, of Croydon, grocer, entered into an agreement in writing, dated the 3rd of December, 1798, with the plaintiffs Church and Upton to grant them a lease for twenty-one years from Christmas next, of a house, warehouse, and other premises in High Street, Croydon, at the yearly rent of 40*l.*, clear of taxes, except the land tax; and the plaintiffs agreed to accept the said lease and to pay the rent; which lease it was agreed should contain a power for the plaintiffs to determine the lease at the expiration of the first seven or fourteen years on notice: and the lease was to contain a covenant on the part of Worsfold, that he should not at any time within ten years set up, exercise, *or follow the trade of a tea-dealer or grocer within four miles from Croydon, but should, on the contrary, render his assistance to the plaintiffs in the business.

[*259]

In pursuance of the agreement, in January, 1799, the plaintiffs entered; and carried on the business of a grocer in the premises in partnership; until they agreed to dissolve the partnership; that Church should continue the business on his separate account; and the lease should be granted to him alone. Worsfold afterwards sold the premises to the defendant, a grocer, in Croydon, in fee.

The bill, filed in November, 1803, prayed, that the defendant may be decreed to execute a proper lease, conformable to the agreement.

Under a decree, directing the Master to settle a lease, a draft was carried in by each party, varying only in this respect; that the draft, proposed by the defendant, extended the proviso for re-entry for non-payment of rent or breach of covenants to the following case; viz. if Church or Upton or either of them, their

† *Hampshire v. Wickens* (1878) 7 Ch. D. 555, 560, 47 L. J. Ch. 243, 38 L. T. N. S. 408; *In re Lander and Bagley's contract*, '92, 3 Ch. 41, 61 L. J. Ch. 707, 67 L. T. 521.

or either of their executors or administrators, shall assign over this present indenture of lease or their term or interest therein or any part thereof, or demise, let, or part with, the demised premises or any part thereof, to any person or persons whomsoever, without the licence of Brown, his heirs or assigns, in writing, first obtained ; or if Church and Upton or either of them, &c. should become bankrupt, or make any assignment for the benefit of their or his creditors.

CHURCH
v.
BROWN.

The Master's judgment being against the insertion of that clause, an exception was taken to the report.

Sir Samuel Romilly and *Mr. Wetherell*, in support of the exception. * * * [260]

Mr. Alexander, for the report. * * * [261]

Sir Samuel Romilly, in reply. * * *

[The point here established is now so well settled that it is unnecessary to state the arguments of counsel or to refer to the earlier conflicting authorities cited by them.]

[The LORD CHANCELLOR, after referring at some length to the cases which had been cited, said :] [262]

* * The safest rule for property is, that a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make ; and that nothing, which flows out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose ; that it is upon the party, who has forborne to insert a covenant for his own benefit, to shew his title to it ; and that it is safer to require the lessor to protect himself by express stipulation, than for courts of equity to hold, that contracting parties shall insert, not restraints, expressed *by the contract, or implied by law, but such, more or less in number, as individual conveyancers shall from day to day prescribe, as proper to be imposed upon the lessee ; and that, all those restraints, so imposed from time to time, are to be introduced, as the aggregate of the agreement. * * * [268] [*269]

CHURCH
v.
BROWN.

Is it then to depend upon the nature of the property? Is an agreement for the lease of a public house, where nothing more is expressed, to be carried into execution in a different manner from an agreement as to property of another species; with regard to which, though there may not be the same reason, the landlord may have reasons, operating upon him just as powerfully, for requiring the restraint? The proposition would appear extraordinary, as to an agreement for the lease of a public *house, that the tenant was to have a more extensive interest, before a licence was necessary, than he would now be entitled to in the execution of such a contract; that on account of the alteration of the general law in that respect a different decision is to be made upon the same words.

[*270]

Upon the whole, I came into Court with a firm opinion, that the best, that is, the most legal, decision of this case would be, that the Master is right in rejecting this covenant: but, the case of *Brown v. Raban* having been decided yesterday, an authority of such great weight, I will discuss the subject with the MASTER OF THE ROLLS, before I decide this case. There is a specialty here; that this agreement does specify some covenants, that the lease is to contain; and has no reference to the general expression "usual and proper covenants:" but there is very little difference, whether those words are found in it, or not, with reference to the ground of my opinion; which is, that, where the interest to be demised carries with it the power of alienation, it can be shut out only by express contract; and the proper and usual covenants must be such as would be inserted in a lease, giving the power of alienation for twenty-one years.

* * * * *

Aug. 9.

THE LORD CHANCELLOR:

[271]

I have examined the Register's book† as to the case of *Henderson v. Hay*; ‡ with the view to ascertain, whether it is to be considered merely as the opinion, or as the judgment, of Lord THURLOW. The cause came on upon the objection to the clause; which was proposed; as it is stated in the report; and it was declared, that the defendant has not any right to insist upon the clause to restrain the alienation of the premises being

† Register's book, 1791, A. fol. 337.

‡ 3 Br. C. C. 632.

inserted in such lease; reserving the consideration of costs. It is therefore a declaration in judgment upon the very point.

CHURCH
v.
BROWN.

I have had sufficient communication with the MASTER OF THE ROLLS for this purpose. The law of this Court is *unquestionably, as Lord THURLOW there declared it; and I conceived it to have remained undoubted until the case before Lord Kenyon; † which cannot justly be considered merely as a decision; as his Lordship was eminently skilled in the doctrine of this Court; and could not have been ignorant of the case of *Henderson v. Hay*. I therefore say with reluctance, that the reasoning, upon which Lord KENYON determined that case, does not satisfy me, that it is the law. When the point was before the Court of Exchequer, ‡ it does not appear, that the Court found it easy so to state the law; as they deliberated upon it a considerable time. With respect to that case I can only say, that my mind is not by any means satisfied with the reasoning. I have read the two cases § before the Master of the Rolls, which are in print; and certainly it would be very difficult to answer the reasoning, that appears in those judgments. I have stated the grounds of my own opinion upon this point; and I understand, the MASTER OF THE ROLLS still considers that the better opinion; but, the case in the Court of Exchequer having been so decided, he thought it difficult to depart from it. With reference to that however it seems to me, that Lord THURLOW's authority, in 1791, was not treated with all the respect, that is due to it, in the subsequent period; and the existence of these four cases in controversy, three at the Rolls, and this one before me, is decisive evidence, that the point was not set at rest by the case in the Court of Exchequer. The MASTER OF THE ROLLS also agrees with me, that, whether the agreement contained the clause, that usual covenants should be inserted, or not, would not make a material difference; and, with great anxiety to be right upon this point, I *never will consent, that my opinion shall be supposed to stand upon such a distinction. Before the case of *Henderson v. Hay* an

[*272]

[*273]

† *Morgan v. Slaughter*, 5 R. R. 715 (1 Esp. 8).

‡ *Folkingham v. Croft*, 4 R. R. 844 (3 Anstr. 700).

§ *Vere v. Loveden*, *Jones v. Jones*, 12 Ves. 179, 186, both of which cases are covered by the authority of this case.—O. A. S.

CHURCH
v.
BROWN.

agreement for a lease would have been executed precisely in the same mode, as to the covenants to be inserted, whether that clause had been contained in it, or not: so would an agreement for the conveyance of a real estate. In this case therefore I must act upon my clear opinion of what the law is; which is, that the lessor is not entitled to such a covenant.

The exception was accordingly overruled.

1808.
Aug. 11.

STAMFORD FRIENDLY SOCIETY, EX PARTE.

(15 Vesey, 280—282.)

ELDON, L.C.
[280]

The preference, given to friendly societies by the stat. 33 Geo. III. c. 54, s. 10, over other creditors, is confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract: therefore does not extend to money, held by the treasurer upon the security of his promissory note, payable with interest upon demand.

THIS petition, presented by two of the members of the Friendly Society, on behalf of the Society, under the Act of Parliament,† prayed that the assignee of Hanson, who had taken the benefit of an act of insolvency, may be ordered to pay the sum of 60*l.*, with interest, to the petitioners, in full discharge of his debt to the Society, and in preference to his other creditors, under the following circumstances:

The petition stated, that Hanson, who kept a public house, at which the Society assembled, upon the 8th of October, 1805, the day of their annual meeting, as the father and treasurer of the Society, had in his hands 30*l.* belonging to them; and, the Society having some money in the box, 20*l.* was placed in the hands of Hanson; who gave as security his promissory note, expressed to be for the sum of 50*l.*, borrowed and received of the Society, which he promised to pay upon demand with 4*l.* per cent. interest. The other sum of 10*l.* was stated to have been placed in his hands under the head of subsistence money. He paid interest upon the sum, secured by the note for two years.

Mr. Heald, in support of the petition, referring to the late

† Statute 33 Geo. III. c. 54, s. 10.

cases † upon this Act of Parliament, contended, that the whole of this sum of 60*l.* was money in the *hands of Hanson, as treasurer of the Society ; and therefore a debt under the Act to be paid in preference to his other creditors ; distinguishing those cases, as the money was not in the possession of the party, as an officer.

STAMFORD
FRIENDLY
SOCIETY,
Ex parte.
[*281]

Mr. Hall, for the assignee :

Of this debt 50*l.* clearly cannot be considered as within this Act of Parliament. That was not in his hands as an officer of the Society ; according to the words of the Act money, remaining due, received by virtue of his office : but money lent to him upon security ; with interest at a particular rate : a case, provided for by another clause † of the Act. This case falls within the cases that have been mentioned ; except as to the 10*l.* ; which certainly is under different circumstances.

THE LORD CHANCELLOR :

It is not for my consideration, whether this Act of Parliament, which certainly has a very harsh operation upon other creditors, excluding every fair, honest, demand from sharing equally with these societies, was a reasonable provision of the Legislature : but at least those, who claim the preference, must shew their right to it in the mode, prescribed by the Act. The preference is given in respect of money, received by officers of these societies by virtue of their offices : but it never was the intention of the Legislature, that persons, to whom they chose to lend their money, should pay them in preference to other creditors. The preference is given only in respect of money, which got into the hands of officers independent of contract. This petition is entirely silent upon the fact, how far, and for what purpose, the rules *of this Society permitted the treasurer to receive and keep money ; except the single allegation, that, as father and treasurer of the Society, he had in his hands 80*l.* which is an averment, that he had that sum in his hands as treasurer. The whole of this sum of 50*l.* was money in his hands by contract ;

[*232]

+ See *Ex parte The Amicable Society of Lancaster* ; *Ex parte Ross*, 6 R. R. 51 (6 Ves. 802).
† Sec. 6.

STAMFORD
FRIENDLY
SOCIETY,
Ex parte.

not upon bond, or any obligation by virtue of his office. As to the 10*l.* it is probable, that sum, which is stated to have been placed in his hands as subsistence money, did get to him as treasurer. Keeping the public house, where they met, he might have had the money in his hands for that purpose. My opinion is, that the Legislature did not intend, that these Societies should have the very large remedies, given to them by this Act of Parliament, unless the money was dealt with precisely as the Act directs; and, if, instead of resting upon the security, which the Legislature gives them, they lend money to one of their officers upon a special contract between him and them, that is a loan to him; and is not to be considered as money in his hands by virtue of his office within this Act of Parliament. These Societies must understand, that, if they will lend money upon special contract, they have not the remedies, which they suppose they have.

The order was accordingly made for payment of the sum of 10*l.*; but was refused as to the remainder of the petition.



1808.
July 14, 15,
26.

ELDON, L.C.

[297]

WARD v. HEPPLE.†

(15 Vesey, 297—299.)

Lien of the agent in town upon the papers in his hands for what was due to him, as agent in the cause, from the solicitor in the country.

A MOTION was made, that the former agent in town for the defendants may be ordered to deliver to the defendants or their present agent all deeds, papers, &c. in his custody, belonging to the defendants, on payment only of what if any thing, shall be found due from the present solicitor in the country, to him, as agent in the cause.

The late agent in the cause claimed a lien upon the papers, not only for what was due to him from the present solicitor, which was admitted to be trifling, but also for what was due to him, as agent in the cause, by the former solicitor, amounting to 232*l.*; for which and other debts he was a prisoner in Dover

† *Lawrence v. Fletcher* (1879) 12 Ch. D. 858.

gaol : the defendants insisting, that he had been over paid ; having received from them 65*l.* ; the agent opposing to that allegation the length of the pleadings, and the nature of the cause ; in the course of which one of the defendants came to town : and transacted business personally with him.

WARD
v.
HEPPLER.

Mr. Hart and *Mr. Horne*, in support of the motion, contended, that the agent in town has no lien upon the papers ; as there is no confidence between him and the suitor. [They cited *Farewell v. Coker*.†]

Sir Samuel Romilly and *Mr. Bell*, for the agent, insisted upon the lien ; and put the case of a bill dismissed by the agent's negligence in not instructing counsel ; who would be liable to an action by the suitor.

[298]

The LORD CHANCELLOR said, he thought this point had been determined in this Court ; and by analogous cases at law ; and apprehended, that the lien could not be maintained : the agent being considered as paying the clerk in Court upon the credit of the solicitor in the country.

The Register was directed to search for precedents ; and an order was made, that, the defendants undertaking to pay the late solicitor in the cause in the country what should appear to be due upon taxation he should deliver his bill ; and the agent in town should be at liberty to deliver his bill to the defendants, as agent for that solicitor in all business, done by him, for the defendants, as solicitor in this cause, or otherwise : the defendants undertaking to pay the agent what shall appear to be due to him after deducting what they have paid to the solicitor. The Master was directed to tax such bills ; to take an account of the money advanced ; and to ascertain the balance, if any due to the agent. It was declared, that the agent in town has a lien upon the deeds, papers, &c. in his hands, for such balance, due to him from the late solicitor in the country ; and the defendants were ordered not to pay the balance, or any part thereof, if found due

† 2 P. Wms. 460.

WARD
v.
HEPPLE.

[*299]

from them, to him without the consent of the agent. The defendants were ordered, pursuant to such their submission, to pay to the agent what should appear to be due to him, after deducting what they have paid to the late solicitor in the country; and to pay to that solicitor what shall appear to be due to him, after the payments, already made to him, and the payments, *which they shall make to the agent in town in pursuance of this order; and thereupon the late solicitor in the country was ordered to deliver to the defendants all the deeds, papers, &c. in his custody belonging to them; and, the defendants undertaking to re-deliver the deeds, papers, &c. now in the custody of the agent in town, in case the Court shall at any time order them so to do, that agent was ordered to deliver all such deeds, papers, &c. to the defendants; and liberty was given to him to apply to have them re-delivered.

1808.
Nov. 17.

ELDON, L.C.
[317]

CLARKE v. WILSON.†

(15 Vesey, 317.) †

Purchaser, having taken possession, but objecting to the title, required either to pay in the purchase-money or deliver up possession.

THE bill prayed the specific performance of an agreement by the defendant, to purchase an estate; or that he may relinquish it. The defendant admitted the agreement; but insisted, that the plaintiff was the natural son of an Englishman, born in Portugal; and therefore an alien; and that he might make a good title by procuring an act of naturalization.

The plaintiff moved, that the defendant might pay into Court the purchase-money and interest. The defendant was in possession of the estate.

The LORD CHANCELLOR said, he thought the plaintiff might require the defendant to pay the purchase-money, or to give up possession of the estate.

† *Ex relatione.*

† *Greenwood v. Turner*, '91, 2 Ch.

144, 146, 60 L. J. Ch. 351, 64 L. T.

261.

HOTHAM *v.* SUTTON.

(15 Vesey, 319—328.)

1808.
Nov. 21.

ELDON, L.C.

[319]

A residuary bequest in general terms. Revocation by a codicil as to "plate linen household goods and other effects (money excepted)." The exception prevents the restrained construction, in general, of the words "other effects": viz. *ejusdem generis*: stock therefore, which does not pass under the word "money," was included, with leasehold and all personal property, except money and Bank notes.

PHILADELPHIA HOTHAM by her will, dated the 15th of January, 1787, [after disposing of certain Bank Annuities for the benefit of her elder son and her daughter and her younger son] gave and bequeathed all the rest and residue of her personal estate and effects of what nature or kind soever unto her said younger children equally between them: the share of her son to be vested and payable at twenty-one; and that of her daughter at that age or marriage; with benefit of survivorship between them; to extend as well to the accruing as the original shares.

[322]

The testatrix on the same day executed a codicil; thereby revoking so much of her will, as related to having given to her son George Frederick Hotham a share of her plate, linen, household goods and other effects (money excepted); and she did thereby give the whole thereof to her daughter; and in all other respects confirmed her will.

The testatrix died soon afterwards; leaving her daughter Philadelphia Hotham, and two sons, Beaumont Hotham and George Frederick Hotham, her only surviving children. At the time of making her will and at her death she was possessed of a leasehold house in South Audley Street, valued at 500*l.*; the sum of 14,767*l.* 16*s.* 9*d.* 3 per cent. Consolidated Bank Annuities: 2,001*l.* 9*s.* 7*d.* 4 per cent. Annuities; and 60*l.* per annum Imperial Annuities; all standing in her own name. She had also at her death 339*l.* 17*s.* 6*d.* at her banker's: 455*l.*, due to her upon a promissory note: plate, valued at 87*l.*: jewels and trinkets, valued at 172*l.*: linen at 132*l.*: household furniture at 440*l.*: wearing apparel at 56*l.*: books at 12*l.*: a carriage at 42*l.*: wines at 94*l.*: and 15*l.*, found in the house.

The bill, filed on behalf of the daughter, an infant, against the

HOTHAM
v.
SUTTON.
[*323]

executors, and her two brothers, prayed, that *the interests of the plaintiff and her brothers in the sum of 14,767*l.* 16*s.* 9*d.* 3 per cent. Consolidated Bank Annuities and the residue of the personal estate under the will and codicil may be adjusted ; [and one of the questions, made at the bar, was] whether the plaintiff was entitled under the will and codicil to all the residue of the personal estate, except such part as consisted of money.

Sir Samuel Romilly and *Mr. Benyon*, for the plaintiff :

[*324] * * If the clause of revocation in the beginning of the codicil had concluded with the words “other effects,” the construction must have been *confined to effects *ejusdem generis* : but the exception of money gives an explanation, which excludes that construction ; shewing, in what respect she meant to limit that general expression ; conceiving, that, unless qualified, it would comprehend all her property of every description ; and meaning to except the single article, money. The restrained interpretation of the word “effects” therefore cannot be applied in this clause. Then what passes under the bequest of “money” ? It has always been considered, that money and bank notes in the possession of the testator, or at his banker’s, would pass ; and nothing else : the plaintiff therefore under the codicil is entitled to the leasehold house, plate, linen and every article of personal estate, except money and bank notes in the possession of the testatrix, or at her banker’s.

Mr. Richards and *Mr. Bell*, for the defendant, the younger son George Frederick Hotham :

* * This codicil, made upon the same day as the will, is only a partial revocation ; and upon the word “effects” with reference to the subject, and the previous expressions, the intention is plain, to take out of the residue, bequeathed by the will, articles of a certain description only, specified by the codicil : plate, linen, and household goods : the will containing nothing as to such articles.

* * * * *

[325]

Sir Samuel Romilly, in reply. * * *

THE LORD CHANCELLOR [after deciding a question not material to this report said :]

HOTHAM
v.
SUTTON.
[326]

With respect to the second question, the doctrine appears now to be settled in this Court, that the words “other effects” in general mean effects *ejusdem generis*.† I cannot help entertaining a strong doubt, whether this testatrix, if asked, whether she meant effects *ejusdem generis*, or contemplated the share of all, which she had considered her effects in the will, would not have answered, that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented *as *ejusdem generis* with plate, linen, and household goods. The express exception of money out of the “other effects” shews her understanding, that it would have passed by those words; that express words were required to exclude it; and by force of the exclusion in the accepted article she says, she thought, that the words of her bequest would carry things, not *ejusdem generis*. This disposition must therefore be taken to comprehend all, that she has not excluded; which is money only. The question then comes to be, whether stock, supposing it to be part of the residue, is money; whether it was ever considered money in such a bequest as this. There is no instance of that. Stock does not pass by the word “money”; and the argument is fortified by what I must, as a Judge, take to be a deliberate contrast of stock and money throughout this will. * * *

[*327]

MACKRETH v. SYMMONS.‡

(15 Vesey, 329—355.)

A vendor has a lien for purchase-money unpaid against the vendee, volunteers, and purchasers with notice, or having equitable interests only, claiming under him; unless clearly relinquished; of which another security taken, and relied on, may be evidence; according to the circumstances; the nature of the security, &c.

Lien, where either conveyance, or payment, was by surprise.

THE bill stated, that in the years 1783 and 1784 the plaintiff was indebted to John Manners in several sums, amounting in the

1808.
May 13, 14.
Nov. 26.

1809.
Jan. 24.

ELDON, L.C.

[329]

† *Bawlings v. Jennings*, 9 B. R. 137 (13 Ves. 39).

‡ *Kettlewell v. Watson* (1879) 26 Ch. D. 501.

MACKRETH whole to 13,500*l.*; for which sums John Martindale, as surety,
v. joined the plaintiff in bonds. In 1790 Martindale, having upon
SYMMONS. a settlement of accounts with the plaintiff in 1785 taken credit for payment to Manners of 3,000*l.* undertook to discharge the remaining 10,500*l.*; and they settled an account accordingly. Other accounts were afterwards settled between them: the last in February, 1792; upon which a balance of 54,000*l.* was due to Martindale, including 10,898*l.* 17*s.* the value of annuities, granted by the plaintiff; against which Martindale agreed to indemnify the plaintiff in consideration of the plaintiff's agreeing to pay him the amount. A bond for 20,000*l.* was given accordingly: and a mortgage in fee was executed by the plaintiff to Martindale for the balance of 54,000*l.*

By indentures of lease and release, dated the 30th and 31st of October, 1793, reciting an agreement by the plaintiff to sell the reversion of the mortgaged estates to Martindale, which was valued at 60,000*l.* composed of the principal and interest, due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs, to the use of the plaintiff for life; with remainder to John Martindale in fee.

[*330] The bill farther stated, that John Martindale did not, according to his undertaking, pay the sum of 13,500*l.* *to Manners, nor the value of the annuities; which sums constituted part of the consideration for his purchase of the reversion of the estate. In September, 1797, a commission of bankruptcy issued against him; under which Manners' representatives proved the debt upon the bonds; and received dividends: the plaintiff being obliged to pay remainder of the debt on account of those bonds; being 14,128*l.* 3*s.* 9*d.* besides costs, and several sums on account of the annuities.

John Martindale before his bankruptcy had contracted to execute a mortgage to the defendant of the reversion, comprised in the indentures of 1793; and the plaintiff claiming a lien upon the estate for the payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the commission. In 1798 Symmons obtained a decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the plaintiff's

claim; and afterwards filed a bill of foreclosure against the assignees; and obtained a decree; Mackreth not being a party to that suit. The legal estate was vested in Coutts, as a trustee under a conveyance by Mackreth and Martindale in 1793, to secure annuities of 2,000*l*.

MACCRETH
v.
SYMMONS.

The bill, filed by Mackreth, prayed a declaration, that the plaintiff has a lien upon the reversion of the estates, sold to Martindale, and mortgaged to Symmons, for the payments he had been obliged to make, and those sums, which he may hereafter pay in respect of the annuities, &c.

The defendant Symmons by his answer denied, that he had any notice, prior to his entering into the agreement with Martindale, that the plaintiff had not received full consideration; and submitted, that he had no lien.

Sir Samuel Romilly and *Mr. Wriottesley*, for the plaintiff: [331]

The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman v. Tanner*,† to *Nairn v. Prowse*.‡ * * The estate was never properly out of the hands of the plaintiff. He had not taken a security, carved out by himself; which might preclude the equitable lien he once had; which therefore still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien as in the case of a purchaser for valuable consideration, actually paid in that transaction; who is affected by notice. * * *

[332]

Mr. Richards, *Mr. Alexander*, and *Mr. William Agar*, for the defendant:

* * In the case of *Chapman v. Tanner* § there was a special agreement: the title-deeds were kept by the vendor: a deposit of the title-deeds of itself amounting to an equitable charge. Other cases, besides those, which have been mentioned, in which this point arose either directly, or incidentally, are *Bond v.*

[333]

† 1 Vern. 267.

§ 1 Vern. 267. See 6 R. R. 42.

‡ 6 R. R. 37 (6 Ves. 752).

MACCRETH *Kent*; † *Pollexfen v. Moore*; † *Fawell v. Heelis*; § and *Blackburn*
 v. *Gregson*. || The result of all of them is, that, where a
 security is given, there is no place for this equity: the pur-
 chaser certainly having to shew, that it does not exist. Here
 a bond was given by Martindale: the security stipulated be-
 tween the parties; and therefore the lien, substituted by equity,
 where there is no stipulation for a particular security, cannot
 be raised.

Sir Samuel Romilly, in reply :

[*334] The plaintiff being called upon, and obliged to pay, the debt,
 against which Martindale undertook to indemnify *him, that
 undertaking forming the consideration of Martindale's purchase,
 he cannot upon the ground of fraud be permitted to retain the
 estate. The lien therefore is clear in respect of the 10,500*l*.
 The distinction as to the annuities rests upon the single circum-
 stance, that a security by a bond of indemnity was taken; which
 is confined to the annuities. * * *

[336] The result of the authorities, and of the circumstances, to
 which they are to be applied, is, that, a part of the money,
 which was the consideration of the original purchase, remaining
 unpaid, the Court will raise the lien; and will enforce it against
 a second purchaser, with notice; that universally the time of the
 conveyance, as well as the time of the advance, is material with
 regard to notice; and that this defendant clearly had notice
 before the conveyance.

* * * * *

Nov. 26. THE LORD CHANCELLOR, having stated the case very particularly,
 and observing, that the legal estate in the *premises was,
 [*342] before the assignees of Martindale executed the agreement
 for a mortgage to Symmons, vested under a former convey-
 ance by Mackreth in a trustee to secure annuities, granted
 by him, pronounced the following judgment:

This case, when it was argued, and since, has appeared to me
 to involve a question of very great importance; with regard to

† 2 Vern. 281.

‡ 3 Atk. 272.

§ Amb. 724; 1 Br. C. C. 422 n.

|| 1 Br. C. C. 420.

which I am not able to find any rule, which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory; as, when a rule, so plain, is once communicated, the vendor not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be, that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious, that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shews his purpose, cannot know the situation, in which he stands, without the judgment of a Court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities; from which it is clear, that different judges would have determined the same case differently; and, if some of the cases, that have been determined, had come before me, I should not have been satisfied, that the conclusion was right.

MACKRETH
v.
SYMONDS.

This bill insists upon a lien, in respect of these annuities: *to be paid all, that the plaintiff himself has paid; and either as to the original value, or the present value, or the future payments. I state that claim in these different terms; as, to determine, what is the lien, it is necessary to point out the amount of it; and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee: but it was not carried far; and it is too late to raise a doubt upon it: but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time. [His Lordship then considered at length a great number of cases to which it is no longer necessary to refer and continued:]

[*343]

From all these authorities the inference is, first, that, gene-

[349]

MACKRETH
v.
SYMMONS.

[*350]

rally speaking, there is such a lien ; secondly, that in those general cases, in which there would be the lien, as between vendor and vendee, the vendor will have the lien against a third person ; who had notice, that the money was not paid. Those two points seem to be clearly settled. I do not hesitate to say, that, if I had *found no authority, that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle ; as I cannot perceive the difference between this species of lien and other equities ; by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee ; and C. taking from him, and having notice of the payment by A., would also be a trustee ; and many other instances may be put. The more modern authorities upon this subject have brought it to this inconvenient state ; that the question is not a dry question upon the fact, whether a security was taken ; but it depends upon the circumstances of each case, whether the Court is to infer, that the lien was intended to be reserved ; or that credit was given, and exclusively given, to the person, from whom the other security was taken.

[*351]

In this case, having, as other judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances, which I have endeavoured to collect. I must say, I have felt from the first, that there is upon the part of the plaintiff that natural justice and equity, which excite a wish, that I could enforce the lien throughout : but, first, as to the annuities, I am persuaded, that, with reference to that part of the case, involving the question of lien as to the consideration, or any part of it, or any sum of money, the *quantum* of which is to be estimated with reference to the present value, or the past, or future payments, this is a case, in which the plaintiff intended to rely entirely upon the personal security : the bond for 20,000*l.* ; and that was the conception of Martindale also ; by whose default of payment therefore the estate is not now subject to the lien in respect of the consideration of the annuities, or any allowance in respect *of it. See how it stands. In 1790 the plaintiff, as principal, and Martindale, as surety, being engaged in an obligation, which I understand to be a per-

sonal one, for these annuities, agree to change situations: Martindale to be the principal, and the plaintiff to be surety; in consideration of which the plaintiff agrees to give 9,000*l.*, secured by a mortgage. It rests upon that until 1793; when the transaction takes this course; that Martindale shall be, no longer a mortgagee, but owner of the reversion in fee; and, which is material, of the reversion, expectant upon the plaintiff's life-estate. The annuities remain upon the old footing: that is, some payments were made, or arrears accrued, between 1792 and 1793; and payments were to arise from time to time. The value, given to Martindale in 1792 by the mortgage of 9,000*l.* for taking the liability upon himself, was a value, which merely by the lapse of time between 1792 and 1793 must have varied. If the annuities had been paid, there must have been a difference in the estimation: also *de anno in annum* the value was decreasing; not only, as the annuities were wearing out; but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties, dealing for the consideration of annuities, and the purchase of a reversion, which might not take effect in possession, until all the annuitants were dead, relied on that reversion, as security in addition to the indemnity by the bond for 20,000*l.*: in the original transaction the estate being pledged for the sum of 9,000*l.*, as if actually paid.

Then, as to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments; that, one sum being paid, it does not attach: another sum not being paid, it does attach: a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made; and is that *inference to be drawn, where a conveyance was executed without the least notice of such an intention; a security taken, not of itself sufficient to exclude the purpose of such a lien; but the nature of the subject, connected with the fact of that security taken, is decisive proof against such an intention; and it appears accordingly in the other cause, *Symmons v. Rankin*, that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of 2,000*l.*, without the least reference to such an intention.

MACKRETH
v.
SYMMONS.

[*352]

MACCRETH
v.
SYMONS.

I admit, that the opinion of Lord LOUGHBOROUGH,[†] that the case[‡] before Lord Camden went upon the ground of lien, is an authority very considerably against my opinion; and I cannot say, upon what the case did proceed, if not upon that ground; as, the estate, given by the wife to her husband for his life, after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is accurately represented, Lord CAMDEN's opinion seems to have been, that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time; and, so understanding it, I cannot bring my mind to the conclusion, that it is an authority, which ought to lead me to determine, that with reference to these annuities there is a lien, either for the original value, the present value, or the future payments, which may, or may not, become due.

[*353]

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the *sum of money due to Manners. My individual opinion is, that the intention was the same as to both: but with regard to the latter the cases authorize the lien; unless it is destroyed by particular circumstances; which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of Sir Thomas Clarke;[§] which is very sensible; that, where the conveyance, or the payment, has been made by surprise, there shall be a lien. This plaintiff understood at the time of the conveyance, that this money was to be paid on his account to Manners; which is the same, as if it was to have been paid to himself; and was not paid; and then the only question is, whether, as from the special circumstances as to the value and nature of the annuities I am to infer, that a lien was not intended as to them, I must make the same inference with respect

[†] See *Blackburn v. Gregson*, 1 Br. C. C. 423.
C. C. 420.

[§] 1 Black. 150; *Burgess v. Wheate*.

[‡] *Tardiff v. Scrughan*; stated 1

to this gross sum ; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum my judgment is, that the plaintiff has a lien.

MACKRETH
v.
SYMMONS.

It is contended, that there are other circumstances in this case ; that the defendant Symmons has a conveyance of the estate without notice : or rather, a contract ; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money ; though there is no doubt, the defendant, when he took his conveyance, had notice from the recitals in his title-deed of Mackreth's rights and Martindale's obligations, as vendor and vendee. Neither is it necessary to go into the consideration of another *argument ; that the defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment, as attaching upon the land, and a special agreement by a creditor for a security upon the land. It is not however necessary to determine such questions ; as neither the plaintiff, nor the defendant Symmons, has the legal estate ; which appears in the other cause *Symmons v. Rankin*, to be in Coutts, under the conveyance of 1793 ; in which Martindale and Mackreth joined ; and then between equities the rule "*Qui prior est tempore potior est jure*," applies.

[*354]

The result of this case is, that the bill must be dismissed as it regards the annuities ; and is right as to the other part of the claim ; and, being right in one point, and wrong in the other, the decree must be without costs.

This case was mentioned by way of motion to vary the minutes, upon a misunderstanding as to the costs.

1809.
Jan. 24.

THE LORD CHANCELLOR, having repeated the ground, upon which no costs were given, made the following additional observations :

Since the judgment was pronounced, I have met with a case, which was not cited in the argument, but is referred to in Mr.

MACKRETH Sugden's work;† which seems to me to be a book of considerable
r. merit; in which this subject *is considered with much atten-
SYMMONS. tion; and he comes to a conclusion, different from mine. I
 [*355] looked into the Register's book for that case; the name of which
 I do not recollect; and it does seem to me, that his inference is
 not the necessary inference, arising from the circumstances of
 that case; as I find it in the Register's book. I mention this to
 shew, that I have not withdrawn from the opinion I have ex-
 pressed upon this subject; as to which, conceiving it to be of
 great importance, I should, if convinced, be very ready to retract:
 but, having endeavoured to collect all the doctrine of the Court
 upon it, I am sure I am right in that. I wish I was as sure in
 the application of the evidence.

1809.

Feb. 26.

March 1.

DAWSON v. CLARKE.

(15 Vesey, 409—418.)

Rolls Court.

A SHORT report of this case on appeal (18 Ves. 247) will be
 found in Volume 11 of the Revised Reports.

1808.

Aug. 8.

Dec. 19.

LUPTON v. WHITE.**WHITE v. LUPTON.**

(15 Vesey, 432—444.)†

ELDON, L.C.

[432]

An agent, or bailiff, confounding his principal's property with his
 own, may be charged with the whole; except what he can prove to be
 his own.

THE bill, upon which the first of these causes was instituted,
 praying an account of lead ore, obtained under premises, called
 The Little Ing, in the manor of Beverley in Yorkshire, claimed
 by the plaintiff, as his estate; and an injunction against continu-
 ing to work the mine. The defendants were the owners of
 considerable lead mines adjoining, and lessees under him; con-

† See Sugden's Law of Vendors
 and Purchasers. The case alluded
 to by the LORD CHANCELLOR, ap-
 pears to be *Comer v. Walkley*: stated,

from the Register's book.

† *Cook v. Addison* (1869) L. R. 7
 Eq. 466, 470.

tending, that The Little Ing, which did not contain more than four or five acres, was comprehended in the leases. An injunction, having been obtained, was dissolved upon the undertaking of the defendants, that, being permitted to continue to work the mines, which had been worked together, as one mine, distinct accounts should be kept of the ore, produced from under The Little Ing. An issue was directed; and the verdict having established the plaintiff's title to those premises, an account was directed of the lead ore, &c. got by the defendants in the first cause under the close, called The Little Ing. The Master's report stated, from the affidavit of the defendant White, that the other defendants were lessees under him, or otherwise concerned as partners in the Prosperous mine, also situated in Beverley, rendering a certain duty in lead to him, as rent; *that they were at the entire risk and whole expense of working that mine; and consequently the books of account, &c. were in their custody.

LUPTON
v.
WHITE
WHITE
v.
LUPTON.

[*433]

The report farther stated from the affidavit of Findlay, one of the defendants in the first cause, that two books of account produced were the only books kept for entering the general accounts of the lead mines, including The Little Ing; and that all the ore, which during the years 1802, 1803, and 1804, were got in Prosperous mines and under Little Ing, was brought up through the shafts and levels of, and smelted and sold, as belonging to the Prosperous mine. Two of the lessees stated, that, before they entered upon any working within the limits of The Little Ing, they were apprehensive from the threats of Lupton, that some dispute might probably arise as to their right of getting minerals there: but, as the minerals within The Little Ing were comprised in their lease, they carried their workings into it; and continued them, until the first injunction was obtained; in consequence of which they desisted, until that injunction was dissolved; and upon renewing their workings they had the caution to direct their agent to lay into separate heaps, and to keep a distinct account of, all the minerals, that should be raised from The Little Ing, and to inform the smelters, which was the particular ore, which came from that ground; that they might distinguish it.

LUPTON
v.
WHITE.
WHITE
v.
LUPTON.

[*434]

The Master stated his opinion upon all the books produced, that the defendants have not rendered a true account of the lead, got from The Little Ing; and that the account of sales of lead in the book, entitled "The Accounts of Little Ing," and several other books produced, have been so kept or contrived as to prevent a true discovery, as well of the ore, got by the defendants *Wood & Co. from under Little Ing, as of the lead produced therefrom; and that for the purpose of preventing a discovery of the ore, got from under Little Ing, and of the lead produced therefrom, the defendants Wood & Co. caused the ore, got from The Little Ing, to be mixed with the ore, got out of their adjoining mine; and the ore from both mines was smelted together at the same hearth, and marked with the same mark and letter; that in payment of the duty in lead to the defendant White no distinction was made between the lead, arising from the ore, got from one mine and the other; and, in order to prevent a proper examination of the workings under Little Ing, the defendants permitted some of the workings to fall in; wilfully filled up other parts with rubbish; and drowned the lower part: so that no true estimate could be formed of the quantity of ore, got by the defendants Wood & Co. from or under Little Ing; and under all the circumstances and upon all the evidence, the Master stated, that he found it impossible to take an account with any degree of accuracy of the ore, &c. got under The Little Ing.

Exceptions were taken to the report; on the ground, that the Master had not charged the defendants with the sum of 23,986*l.* 9*s.* 6*d.*; received by them as the value or produce of lead, which under the circumstances, proved before the Master, ought to have been made from the ore, got by them from under The Little Ing.

[435]

Sir Samuel Romilly and *Mr. Bell*, in support of the exceptions [cited *Panton v. Panton*,† *Armory v. Delamirie*,‡ and *White v. Lady Lincoln* §]. This case has farther the peculiar circumstance, that these defendants, in consideration that

† In the Court of Exchequer.

§ 7 R. R. 71 (8 Ves. 363).

‡ 1 Str. 505.

the injunction should be dissolved, and they should be permitted to proceed with their works, undertook to the Court, that the accounts should be perfectly clear and distinct. The effect of that undertaking is, that they were bound by contract to the Court to consider themselves as bailiffs: yet they have not only not kept distinct accounts of the ore *produced, but by suppressing and fabricating evidence and other management have deprived the Court of all means of having distinct accounts.

LUPTON
v.
WHITE.
WHITE
v.
LUPTON.

[*436]

Sir Arthur Piggott, Mr. Richards, Mr. Wear, and Mr. White, for the defendants, contended, that the proposition is extravagant, that, as the ore, produced from the plaintiff's mine, has been mixed with the produce of the other, the plaintiff should have the whole.

THE LORD CHANCELLOR:

The Master's report, stating, that he cannot take the account, which has been directed, is the subject of farther directions, rather than of exception. The account was directed upon a familiar principle of equity; though the object might have been obtained in an action for mesne profits, or trover. An inquiry before a jury having ascertained satisfactorily, that the plaintiff is entitled to what was under these premises, the Court was bound to enjoin the defendants from proceeding: or, permitting them, with reference to the convenience of both mines, to proceed, that could be allowed only upon their undertaking to keep an account; and then they cannot be heard to say, they could not keep it. If the account does not satisfy the object and intention of that undertaking, it is not a compliance with the condition in that rational sense, in which it must be understood. If the result is, that the Master cannot take the account, it is clearly not for him, without a farther direction, to apply the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished

LUPTON
v.
WHITE
WHITE
v.
LUPTON.
[*437]

*as satisfactorily, as it might have been before that unauthorised mixture upon his part. There may be cases, in which the Master may charge parties upon that principle: but it must be under the direction of the Court; who will judge, whether the case is proper. I agree entirely with the Master, that under these circumstances he cannot take such an account as this decree calls for. The consequence is, that upon farther directions it must either be referred back to the Master, with a direction to guide him as to the mode of charging the defendants, where he cannot take the account satisfactorily; or an issue must be directed; taking care not to overlook the principle I have mentioned; which throws the proof upon the defendants.

Therefore I shall not allow these exceptions; but without prejudice to what the Court may think proper to do upon farther directions.

Dec. 19.
—

The cause being heard for farther directions, the same question was again argued: the defendants pressing for a special direction to the Master to receive the books in evidence.

THE LORD CHANCELLOR :

[*438]

This case comes before me under circumstances, in some respects different from any which the Court has hitherto had to deal with in cases of a similar nature. The defendant White, as far as he is concerned, is involved in it simply in consequence of his own undertaking. No misconduct, no fraud, are imputed to him. He is culpable, not morally, but only for having applied too little attention to his own interest. With regard to the other defendants, this is a case of great *and serious importance; especially with reference to the example, which the Court is to furnish; and in my view of transactions of this nature a court of equity ought to go to the extent of all that is just, (and beyond that no Court ought to go) to restrain persons from dealing with the property of others, as these defendants have dealt with the property of this plaintiff.

An injunction having been obtained, the Court refused to relieve the defendants against it, unless they would lay themselves under an obligation, which would prevent those difficulties,

that had obstructed the administration of justice between these parties. With that view, upon an application to dissolve the injunction, the Court refused to interfere, except upon terms: accordingly, the defendant White, who seems to have placed more confidence in his lessees and agents than they deserved, and the other defendants, agreed to the terms proposed; that, as it would be inconvenient to their concerns, entangled as they had been with the working of the mines, claimed by the plaintiff as his inheritance, to discontinue working, as they had done, if the Court would permit them to work under The Little Ing, they would account fully for all they should take from it, if it should appear, that the soil, and the mines under it, were the inheritance of the plaintiff. They stand before the Court upon the faith of that undertaking; which they were bound to make good; as if a receiver had been appointed, or the injunction continued; and these parties are to be considered, not as man acting towards man, but with reference to an undertaking by one man to leave the other as safe, as if the protecting hand of this Court had been over him.

LUPTON
v.
WHITE.
WHITE
v.
LUPTON.

A verdict has determined, that The Little Ing is the close of the plaintiff; and it is now therefore established, *that after the injunction issued these defendants had taken the plaintiff's property. The necessary consequence is, that all, which has been taken, has been taken by wrong; that of all, which has been taken, since the injunction was dissolved, a clear account ought to be rendered: an account, free from difficulty. The account was prayed, and granted, accordingly; with the proper directions as to allowances and costs, which justice between parties under such circumstances prescribed; and that has produced this report; establishing the facts, that, the defendant White imprudently considering himself as having no concern with it, taking no care, that what had been wrongfully obtained was made good, but placing a most unwarranted confidence in his agents and lessees, the thing proceeds in such a way, that books were fabricated; the produce of the different mines mixed; no distinct accounts kept; workings allowed to fall in; and cavities filled up: so that I have no means of charging the defendants with the fair amount of what they have taken; and

[*499]

LUPTON
 v.
 WHITE.
 WHITE
 v.
 LUPTON.

the Master, speaking of the evidence, represents, that by contrivance it has become impossible to discover, what would be the result of a fair and just account of the produce of The Little Ing.

[*440]

What then is the conclusion? If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was, not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice, that such should not be the state of things between them, by those means preventing the guard, which the Court would have effectually interposed, *is the argument to be endured, that, as the party, so injured, cannot distinguish his property, therefore he shall have nothing? That is not the law of this country; as administered in courts either of law or equity. The case of the diamond ring, found by a poor boy, proves the contrary. He had not the means of shewing the value. The person who took it from him, by wrong, prevented the jury from ascertaining the value by production of the ring, or other evidence. Therefore, as it was proved that the plaintiff's evidence had been destroyed by the act of that person, who ought to have refrained from placing the transaction in that state, the Lord Chief Justice directed the jury to find, that the stone was of the utmost value they could find; upon this principle, that it was the defendant's own fault, by his own dishonest act, that the jury could not find the real value.

The case of *Panton v. Panton*† applies to this. A clerk in a banking-house at Chester remitted his own money, with that of his employer, to an agent in London, to be laid out upon security; and by management the securities were so changed, that the property could not be distinguished. The Court of Exchequer held, that, the confusion being occasioned by him, who so dealt with the property, the distinction lay upon him; and, if he could not distinguish what was his own, the whole must be considered as belonging to the other.

A principle, not dissimilar, though not precisely the same, governed me in the case of Mr. Jackson's executors.§ There

† *Armory v. Delamirie*, 1 Str. 505.

‡ In the Court of Exchequer.

§ *White v. Lady Lincoln*, 7 R. R.

71 (8 Ves. 363).

was no more duty imposed upon him *than upon these individuals. He had kept the account, and, as it appeared to me, not incor- rectly, upon his own side: but, having kept it only upon his own, though bound to keep it upon the other side, it was held, that he could not maintain a demand, to which under other cir- cumstances he would have been fairly entitled. The decision was made, not upon the notion, that strict justice was done, but upon this; that it was the only justice, that could be done; and that no more could be done was the fault of Jackson himself; who, if he did not enable those parties to know, what demand they had upon him, could not be heard to say, he had any demand upon them.

LUPTON
C.
WHITE.
WHITE
C.
LUPTON.
[*441]

Upon a principle of the same sort I ventured to go in the case of the late Lord Chedworth.† Some part of the property clearly belonged to Edwards, the steward; and I thought myself entitled in the first instance to lay an injunction upon the whole fund. I do not advert to the case of the horse, before Lord Lough- borough, or to that of the dog, before me, in the Court of Com- mon Pleas; as it is perhaps doubtful, where the law declares dis- tinctly, that the value of the animal shall be given, whether a Judge is justified in directing a jury to give a sum, far exceeding the real value. Those cases however do not interfere with the others.

This report presents to the Court a case of violation of prop- erty, previous to the injunction; giving the right to an account upon ordinary principles. 'After the injunction was dissolved, the defendants were permitted to use this mine upon a pledge of good faith to this Court, that a clear account should be pro- duced; and that the *plaintiff should have no difficulty in ascer- taining his property. If at the hearing it had been stated to me, that there would be any difficulty, I should probably have said at once, that it should be, not on him, but on the defen- dants; and that, if they did not distinguish what was his, all should be taken to be his. What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity: but, if articles of different value

[*442]

† *Lord Chedworth v. Edwards*, 6 R. R. 212 (8 Ves. 46).

LUPTON
v.
WHITE.
WHITE
v.
LUPTON.

are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell, what was the original value of his property, he must have the whole,† and the principle goes to the full extent of what is now contended.* Regretting the consequences in this instance to one of the parties, who is made answerable only for inattention to his own interest, I believe, there is no greater violation of property in this country than of property of this nature.

[*443]

It is said, if the whole is to be understood to be the produce of The Little Ing, except so far as any part can be shewn to be the produce of the Prosperous mine, the effect is to determine, that the whole must be considered as the produce of the former; unless a special direction is given, that these books are to be received *in evidence before the Master. There are, I admit, many cases, in which this Court, giving an account, directs it to be taken with the admission of certain documents or testimonies, not having the character of legal evidence: If parties have been permitted for a long course of years to deal with property as their own, considering themselves under no obligation to keep accounts, as if there was any adverse interest, having no reason to believe, the property belonged to another, though it would not follow, that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to the strict course, but in such a manner as under all the circumstances would be fit. The case however is widely different, where both parties knew, that the property was the subject of adverse claim; and those, who desire to have the rules of evidence relaxed, had undertaken that there should be no occasion for deviating from the strict rule; that there should be clear accounts; that the other party should have his property

† Sir William Blackstone observes the distinction between the civil law and our law upon this point: the former, though giving the aggregate to the party, who did not interfere in the mixture, allowing the other a satisfaction for his loss: "but our law, to guard against fraud, gives

the entire property, without any account, to him, whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent." 2 Black. Com. 404, 5, referring to Popham, 38; 2 Bulstr. 325; 1 Hal. P. C. 513; 2 Vern. 516.

without hazard of loss from the want, or complication, of accounts. In a case of this nature a previous direction to the Master to receive such evidence would introduce a most dangerous principle. The utmost length I can go in such a case is to give liberty to either party, if the Master in taking the account of the produce of the Prosperous mine shall find difficulty as to receiving any evidence, to apply to the Court for directions upon that particular point. It is perfectly clear, that such a reservation will be necessary as to these books; even not considering the imputation, which is cast upon them by the Master's report: but the fact, that better evidence will be wanting, is not sufficiently clear to warrant a prospective direction to the Master to receive them.

LUPTON
v.
WHITE.
WHITE
v.
LUPTON.

The circumstance, that this difficulty, cast upon the plaintiff in recovering his right, is the consequence of the breach of an engagement with this Court, binds me to give even this relief, at the cost of the defendants. I do not mean, that, if any thing culpable should arise before the Master upon the other side, that those costs should be included: but, with that exception, this relief should be given with costs; as it is proper to mark such a case upon the contract of individuals with the Court itself.

[444]

The decree was accordingly made; directing the account; as it was prayed; charging the defendants with the whole net produce, except what they shall prove to have been taken from the Prosperous mine; with all the costs of that inquiry, except as to any thing, that may occur, blameable on the part of the plaintiff in the course of it, with costs; and a special direction, that, if any question as to the admission of evidence should arise before the Master in the course of the inquiry directed, either party should be at liberty to apply to the Court for directions upon such point of evidence.†

† *Lord Hardwicke v. Vernon*, 4 R. B. 244 (4 Ves. 411).

1809.
Feb. 10.

ELDON, L.C.

[476]

SIMPSON, Ex PARTE.

(15 Vesey, 476—478.)

Allegations, material to an issue, are not impertinent; and, if relevant and pertinent, are not in any case scandalous.

Scandalous matter, as allegations reflecting upon moral character, and not relevant to the subject, will be expunged from the record, whether in a suit, or bankruptcy; and without an application.

THE petition, which stood for judgment, stated, that a petition had been presented in June last; praying, that a commission of bankruptcy may be superseded; as being a fraudulent and concerted commission, against a person who was not a trader; and that the certificate may be staid.

The petition farther stated, that in support of that petition an affidavit was filed by the solicitor, concerned in it, containing matter and charges of a criminal nature, reflecting upon these petitioners, and very prejudicial to their character and reputation, not only false and unfounded, but irrelevant and scandalous, as well as impertinent. The petition prayed, that the said affidavit may be taken off the file: or, that the scandalous and impertinent charges and matters, contained therein, may be expunged; and that the said solicitor may be ordered to pay the costs.

The affidavits in support of the objection to the trading stated, that the bankrupt was only an underwriter; who in that character cannot be a bankrupt: those on the other side representing him also as an insurance broker, and a bill broker. The passage chiefly objected to, as scandalous, asserted, that a party, who supported the commission, was one of a gang of swindlers, who attended at Lloyd's Coffee-house, &c.

THE LORD CHANCELLOR:

[*477] This is the first application of the kind in bankruptcy. With regard to its object there are some general principles, *which cannot be doubted. If that, which is stated, is material to the issue, it may be false; but cannot be scandalous: if relevant, it is not impertinent: though scandalous in its nature, if relevant

and pertinent, it cannot be treated as scandalous; and, if false, it must be dealt with in another way: but, if irrelevant, and especially if also scandalous, there would be much reason to regret, that a court should not be armed with the power to protect parties from the expense, and its records from the stain, which too frequently arise from the introduction of irrelevant and scandalous matter upon affidavits in this jurisdiction.

SIMPSON,
Ex parte.

Having read the affidavit, which is the subject of this application, I can find no ground, upon which the greater part of it can be represented as material: nor can I conceive, how a great part can be described as not scandalous; bearing most cruelly upon character. Upon the question, whether I have the power to grant this relief in bankruptcy, I have no doubt whatsoever, and I do not think, with reference to this subject of scandal, in proceedings either in causes, or in bankruptcy, that any application by any person is necessary. The Court ought to take care, that either in a suit, or in this proceeding, allegations, bearing cruelly upon the moral character of individuals, and not relevant to the subject, shall not be put upon the record.

I cannot after this explanation, find, what was that interest, or materiality, which made it fit, that a great part of this affidavit, filed in support of the former petition, should be upon the record. A very considerable proportion of it is perfectly immaterial and irrelevant, though not scandalous; and of that some part is of such a nature, that, not being material or relevant, it must be considered scandalous; and this very unfortunate circumstance *occurs in it: an assertion, so clearly not the fact, that it must be attributed to mistake. The best course, that can be taken, is to order the person, against whom this petition is presented, to pay the costs, actually out of pocket; and that, after payment of those costs, the affidavit shall be taken off the file, as irrelevant and scandalous.

[*478]

The order directed the solicitor, who made the affidavit, within fourteen days to pay the costs of the application, and all the costs, out of pocket, to be taxed as between solicitor and client; and that after payment of those costs the affidavit should be taken off the file.

1808.

July 15, 18.

Rolls Court.

GRANT, M.R.

[507]

BENGOUGH v. WALKER.†

(15 Vesey, 507—515.)

Though generally a satisfaction by will of a portion must be of the same nature, and equally certain, a bequest of a share in powder-works, to be made up in value 10,000*l.*, charged with an annuity of 20*l.* for a life, was held a satisfaction of a portion of 2,000*l.*

Extrinsic evidence admitted, not to construe a will, but to shew, with reference to what it was made.

[*508]

By articles, dated the 18th of January, 1768, upon the marriage of Isaac Elton the younger, and Sarah Peach, reciting a covenant for payment of a portion of 5,000*l.*, Isaac Elton, the father, and the son, covenanted, that the executors and administrators of Isaac Elton the younger, should within the space of three months next *after his decease pay or cause to be paid to the trustees the sum of 2,000*l.*, with interest for the same, from the death of Isaac Elton the younger; upon trust to place the same out at interest, and the dividends and interest therefrom arising to pay to Sarah Elton for her life; and after her death to pay the dividends and interest of the said 2,000*l.* unto and for the benefit of the younger children, if more than one, whether sons or daughters; and, if no younger son or sons, then for the daughters or daughter only of Isaac and Sarah Elton, in such shares or proportions as Isaac Elton the younger by deed or will should appoint; and, in default of appointment, then equally between such younger children, if more than one, until they should attain their respective age or ages of twenty-one years, if sons or a son, but if daughters or a daughter, the said age of twenty-one years or day or days of marriage; and, in case there should be only one child of said intended marriage, then to and for the benefit of such only child, until he, if a son, should attain his age of twenty-one years, and, if a daughter, the same age of twenty-one years, or day of marriage, which should first happen; and upon all and every such said younger children, or child, his, her, or their, attaining his, her, or their, respective ages of twenty-one, or, if daughters or a daughter, the same age or mar-

† *In re Lacon*, '91, 2 Ch. 482, 490, *re Lawes* (1881) 20 Ch. D. 81, 45 60 L. J. Ch. 403, 64 L. T. 429; *In* L. T. 453.

riage, then to pay and distribute said principal sum equally between all and every such younger children or daughters only (if more than one), as they, if sons, &c. should attain twenty-one, or, if daughters, at that age or marriage, according to the appointment of Isaac Elton, or, in default of appointment, equally; and in case of one only child, then upon trust to pay said 2,000*l.* to such only child, if a son, at his age of twenty-one years, or if a daughter, on her attaining that age or day of marriage; and in the event of no children, &c. *to the wife, surviving, or, if she should be dead, to the executors of the husband.

BENGOUGH
v.
WALKER.

[*509]

The settlement contained a proviso, that, in case Isaac Elton, the younger, should in his life-time advance any sum of money for the placing out or promoting or setting up in the world any of the younger sons or son to or in any profession or trade or for the portioning or advancing any daughter or daughters in marriage, then that such sum or sums, so to be advanced by Isaac Elton the younger, should be deemed and taken, if equal to or more than such younger son or sons', daughter or daughters', share of said 2,000*l.* in full of his or her share of that sum; but, if less, then as part of his or her share of such 2,000*l.*; unless Isaac Elton the younger should by will or any writing, &c. declare to the contrary; and, after the death of the father and mother, grand-father and grand-mother, that the trustees might, if need should require, apply a reasonable part for placing out in the world to some profession or trade any younger son or sons.

Sarah Elton died in 1763; leaving her husband surviving, and one son, Abraham, their only issue; who attained the age of twenty-one in 1784. His father did not during his life pay the 2,000*l.* or any part: or make any advancement for his son farther than by the expense of his maintenance and education. Isaac Elton married again; and had children by that marriage. He died upon the 31st of March, 1790; having by his will devised to his son Abraham certain real estates; and bequeathed to him all his capital share interest and concern in certain powder works, to hold to him, his executors, &c.; and he gave him such sum and so much money as, being added to the capital of the said powder-work concern at the last settlement before the testator's decease, should *make up in the whole the full and complete

[*510]

BENGOUGH sum of 10,000*l.*: he Abraham Elton paying thereout to Mrs.
 v. Prout for life 20*l.* a-year. The testator also gave to his son
 WALKER. Abraham a leasehold house, held for lives, or years determinable
 on lives. Abraham Elton had under the will of his grand-father
 a considerable provision; consisting of 5,000*l.* besides some
 estates; to which his father's will referred.

The bill, filed by the executors of Abraham Elton, prayed
 payment of the sum of 2,000*l.*: and the question was, whether
 the covenant was satisfied.

Mr. Alexander, Mr. Hart, and Mr. Roupell, for the plaintiffs:

This is a question of satisfaction by the will of a father of a
 provision for his son under a settlement. The doctrine of satis-
 faction, originally between debtor and creditor, as it has been
 since applied to portions, requires in that instance, though not
 the same precision, a certain degree of resemblance in the
 provision substituted: as Lord HARDWICKE in *Bellasis v. Uthwatt*†
 observes, “the thing, given in satisfaction, must be of the same
 nature, and attended with the same certainty, as the thing, in
 lieu of which it is given; and land is not to be taken in satis-
 faction for money: nor money for land.” * * *

[511] This, as in the case of *Grave v. Lord Salisbury*,† is a provision
 not *ejusdem generis*. This share in the trade also is not a clear
 interest; but is encumbered with an annuity.

Mr. Richards, Sir Samuel Romilly, and Mr. Bell, for the
 defendants:

This provision by will is a satisfaction or performance of the
 engagement in the marriage settlement. The father's object
 was to give a legacy of 10,000*l.* and in the event he does give in
 cash 9,000*l.* to his son. In *Bellasis v. Uthwatt* the thing was
 perfectly distinct: but this is an interest of the value of 10,000*l.*;
 which, in whatever shape, though part only money, and the rest
 a concern of a personal nature, must be a performance of an
 engagement to pay 2,000*l.* A portion is not considered, with
 reference to this question, as any other debt; the presumption
 is, that, if the subsequent provision is as considerable as the

† 1 Atk. 428.

† 1 Br. C. C. 426.

other, it is a satisfaction ; if less, it is a satisfaction in part : the Court leaning against double portions : but upon the circumstances of this case the intention is clear to give this son 10,000*l.* in satisfaction of every demand.

BENGOUGH
v.
WALKER.

THE MASTER OF THE ROLLS :

[512]

The question in this cause is, whether Abraham Elton ever received a satisfaction for the portion of 2,000*l.* to which he became entitled under his father's marriage settlement. The defendants contend, that he has received more by the will. On the other side it is admitted, that a bequest of 10,000*l.* would be a satisfaction of a portion of 2,000*l.* : but it is said, this does not amount to a bequest of 10,000*l.* : it is only a bequest of a share of powder-works ; and of such sum of money as should, together with the value of that share, make up to him the full sum of 10,000*l.* ; and it is contended for the plaintiffs, representing him, that a provision, which is not *ejusdem generis*, can never be a satisfaction for a portion ; as land is no satisfaction for money : nor money for land : or, to come nearer to this case, as in *Grave v. Lord Salisbury* † it was determined, that the value of a beneficial lease was not a satisfaction *pro tanto* of a legacy.

Many other cases might have been cited ; which are in some degree analogous to that ; as decisions upon the effect of a bequest of the residue of an estate : but it is to be observed, that in none of those cases did the party making the advance, or the bequest, ever make either with reference to a definite amount, to which he intended it should reach. They are all cases, in which the testator, without reference to the pecuniary value of the thing he was giving, has given it ; and the question was, whether, as upon entering into a computation of the value of the thing given it turned out equal to the portion, or the legacy ; it should be taken as a satisfaction : the testator not having indicated any idea of his own, *whether it was, or was not, correspondent in value to the debt, which he owed, or the legacy he gave. Those cases therefore would not precisely apply.

[*513]

In the case I have mentioned Lord Salisbury does not appear to have entered into any calculation of the value of the lease ; or

† 1 Br. C. C. 423.

BENGOUGH the proportion it bore to the legacy which he gave to his son ;
WALKER. intending merely to make a provision for him in that particular way. So, in the cases as to a residue : all, that was meant, was to give the residue ; not expressing, that it would turn out to be of superior, or equal, or any given, value.

In the case of *Barrett v. Beckford* † Lord HARDWICKE held the bequest of a moiety of the residue for life not to be a satisfaction of an annuity. There was the further distinction, that it was the case of a debt, not a portion. So, in the case of *Deseve v. Pontet*,‡ where Lord KENYON held a bequest of half of the residue to the testator's wife not a satisfaction, the testator had said nothing of the value, and it was also the case of a debt, not a portion. In the case of *Alleyne v. Alleyne* § Lord HARDWICKE does not, nor did Lord KENYON in the other case, decidedly say, a residue might not under any given circumstances be a satisfaction for a portion ; and in *Alleyne v. Alleyne* Lord HARDWICKE reasoned chiefly upon the one being only for life : the other being an absolute interest ; and would not go into the calculation, that perhaps the residue would turn out to be as much as the son might have purchased for his life with the 1,500*l.* ; if that sum had been paid to him : but in *Richman v. Morgan* ||
[*514] Lord THURLOW held, that a *residue should go in satisfaction of a portion ; and thought it absurd, that a residue, worth 100,000*l.*, should not be a satisfaction of a portion of 8,000*l.*, merely because only a small proportion of the residue was actual money.

I am by no means clear, that, if this testator had confined himself to saying, he gave so much of his residuary estate as should be of the value of 2,000*l.*, that would not have been a satisfaction of the portion of 2,000*l.* I have not found any case, precluding such a determination. But that is not the whole ; for there is upon the face of the will a clear pecuniary bequest to some amount. The amount is, indeed, uncertain ; depending upon the value of the powder concern : but the testator knowing the value of the share not to be 100,000*l.*, says, he means to give in money, all, that the share shall fall short of such sum. If it

† 1 Ves. Sen. 519.

‡ 1 R. B. 15 (1 Cox, 188).

§ 2 Ves. Sen. 37.

|| 1 Br. C. C. 63 ; 2 Br. C. C. 394.

does fall short to the amount of 7,000*l.*, he meant to give 7,000*l.* There is no reason, why I should not inquire the amount of the pecuniary legacy. It is not necessary, that it should appear upon the face of the will; any more than in the case of a legacy to a son of such sum as the testator had advanced to another child upon marriage. Should I not in that instance inquire the amount? You cannot refer to extrinsic evidence to construe a will: but you may, to shew, with reference to what the will was made. . If I find, that the value of the share of the powder concern was 3,000*l.*, then the value of the bequest is 7,000*l.*; and can I take the legatee not to have a satisfaction for 2,000*l.*?

BENGOUGH
v.
WALKER.

It is then said, that the provision made by the will, is clogged with an annuity of 20*l.* to Mrs. Prout; and therefore is not taken so beneficially as the portion; which is not subject to any burthen: but, if I see, that the bequest *is so large, so far exceeding the portion, that the diminution by the burthen imposed upon it, cannot affect the relative proportion, it would be against common sense to say, that, if a bequest of ten times the amount of the portion is burthened with a charge, not to the extent of a tenth part, the remainder, though greatly exceeding the portion, shall not be a satisfaction. The child will have the portion clear; and in as beneficial a manner as by the articles.

[*515]

I lay no stress upon the other provision, which this son had, from his grand-father; and yet it is clear, the father conceived, that this child was amply provided for; assigning that as the reason of the disposition he makes. He must then be taken, when making this provision of 10,000*l.*, to say, “here is an end of all claim by this child upon my estate;” and never could intend that child to claim in diminution of that residue, which he gave to his second son; who was not so provided for; and yet intended to be placed upon an equality with the other. That is evidence of the intention; but the other ground is sufficient for the determination, that this portion is satisfied.

The bill therefore must be dismissed.

1808.
July 27, 28.

Rolls Court.
GRANT, M.B.

[516]

HIGGINSON v. CLOWES.

(15 Vesey, 516—525.)

An auctioneer selling an estate made a verbal declaration at the sale for the purpose of removing an apparent discrepancy between the particulars of sale and one of the conditions of sale.

The purchaser of several lots signed an agreement to abide by the conditions and declarations made at the sale.

The vendor seeking specific performance was not allowed to adduce evidence of the auctioneer's declaration in order to remove the apparent ambiguity of the contract.

THE bill prayed the specific performance of an agreement for the purchase of an estate from the plaintiffs, devisees in trust. The sale was made by auction, on the 4th of December, 1804, in seven lots ; all of which, except Lots 3 and 7, were purchased by agents for the defendant, at the price in the whole of 13,034*l.* 15*s.* The particular, in the description of Lot 1, a freehold estate, called Gallow Hill, stated it generally as embellished with stately timber ; and in specifying the quantities and qualities of the land stated woodland 5 A. 30 P. Lot 2 was called Bangor's Farm, in hand ; consisting of a farm-house, &c. garden and orchard well planted with fruit-trees. The description of Lot 4, a freehold messuage and premises, garden and two orchards, situated below Gallow Hill Wood, contained the following clause :

" There are six pieces of elm and ash timber on this lot, which the purchaser is to take at a fair valuation."

[*517] As to Lot 5, a freehold cottage, &c. gardens and orchard, it was stated, that there were a few timber *trees and saplings on this lot to be taken at a valuation. After the usual conditions for a deposit of 20*l.* per cent. the purchaser to sign an agreement for payment of the remainder of the money on or before Lady-day, that on payment of the remainder the vendor would convey with a good title, &c. and that upon failure of complying with the above conditions the deposit should be forfeited, and the vendor be at liberty to re-sell, &c. The eighth condition of sale was expressed in these terms :

" The purchaser to pay for the fallows, dressings, half-dressings, dung, soil and compost, on the farm in hand as between

farmer going out and farmer coming in ; and to take the timber and timber-like trees down to one shilling per stick inclusive, at a fair valuation."

HIGGINSON
v.
CLOWES.

The agreement, signed by the defendant on the back of the particular, after the usual acknowledgment of the purchase, and that the defendant agrees to pay the remainder of the money and complete his purchase on having good titles executed and conveyed to him, concluded thus :

" I bind myself my heirs executors administrators and assigns to a strict fulfilment of this article and to abide by the conditions and declarations made at this sale."

The defendant objected to the title of Lots 1 and 4 ; insisting also, that he was bound to pay for trees in Lots 4 and 5 only ; and that only, in case a good title was made ; submitting to take the title of Lots 2, 5, and 6 ; and that, as the lots were sold separately, he is entitled to have a conveyance of such of them as the plaintiffs *can make a title to, and to refuse those, to which they cannot make a title. [*518]

The plaintiffs insisted, first, upon the construction of the conditions, that the clause as to the timber extended to all the lots : secondly, that the auctioneer at the sale, in answer to a question, whether the timber upon each lot was to be taken at a valuation, declared publicly, that the timber on every part of the estate was to be valued separately, and taken by the purchaser of each lot at such valuation. This was proved by the evidence of the auctioneer and his clerk : opposed by that of the agents of the defendant, that they did not recollect any such conversation.

The timber on Lot 1 was valued at above 2,000*l.* : that on Lot 2 at 633*l.* 2*s.*, on Lot 4 at 3*l.* 6*s.*, Lot 5, 9*l.* 15*s.* 4*d.* and Lot 6 at 30*l.* 12*s.* 9*d.*

Sir Samuel Romilly and *Mr. Heald*, for the plaintiffs, contended :

1st, That, without resorting to parol evidence, the fair construction of the particular is, that the timber upon all the lots was to be taken upon a separate valuation. The clause, expressing that, as one of the conditions, is not confined to any one particular lot.

HIGGINSON 2ndly, As to the admission of parol evidence, the only cases
 v. applicable are *Gunnis v. Erhart*† and *Jenkinson v. Pepys*.‡ * *
 CLOWES.
 [519] The question, stated correctly, is, whether evidence may be
 admitted, not to contradict the printed conditions, but of ex-
 planations made at the time of the sale. * * *

Mr. Hart and Mr. Bell, for the defendant :

[*520] Parol evidence cannot be admitted, either to contradict *or
 explain a written agreement, except in the instances of fraud,
 mistake, or *ambiguitas latens*. [They cited *Gunnis v. Erhart*,
Jenkinson v. Pepys, *Woollam v. Hearn*,§ and other cases.]

July 28. THE MASTER OF THE ROLLS :

[521] In this case the written agreement leaves the question as to
 the timber in so much obscurity, that I wish I were permitted
 to resort to other evidence to elucidate it: but my opinion is,
 that I cannot admit the parol evidence for the purpose of ex-
 plaining this agreement. I have upon other occasions|| stated
 my opinion, that sales by auction are within the Statute of
 Frauds: but, whether they are, or not, this is clear; that, if a
 sale by auction is followed by a written agreement, that cannot
 be either explained, or added to, by any parol evidence.

[*522] The case of *Jenkinson v. Pepys* is an authority, if an authority
 were required, for that proposition. In *that case the 2nd lot
 was described as an orchard and nursery, well planted. In the
 description of the 3rd lot no notice was taken of any nursery:
 but the fact was alleged, that a considerable nursery or planta-
 tion of young trees was upon that lot; and there was at the foot
 of the particular a *nota bene*, that the timber and timber-like
 trees, with the underwood and plantation in the nursery, were to
 be paid for, down to sixpence per stick, inclusive. Sir Lucas
 Pepys became the purchaser of Lot 3, but not of Lot 2. He
 admitted, that the timber and timber-like trees upon all the lots
 were to be paid for; but contended, that the underwood and
 plantation were to be paid for only in the nursery; which must

† 2 R. R. 769 (1 H. Bl. 289).

§ 6 R. R. 113 (7 Ves. 211).

‡ In the Court of Exchequer. See
 the judgment for this case.

|| *Buckmaster v. Harrop*, 6 R. R.
 132 (7 Ves. 341).

be understood to be that only, which was described, in the 2nd lot. Parol evidence was offered, to shew, first, that there was a nursery or plantation in the 3rd lot: and, secondly, that the auctioneer had frequently during the auction declared, that he sold nothing but the land; and every thing, that grew upon it, was to be separately valued, down to the value of sixpence per stick, inclusive. Other witnesses also stated, that the auctioneer had made that declaration. Witnesses, who were at a greater distance from the auctioneer than Sir Lucas Pepys himself, or his agent, swore, that a particular question was put to the auctioneer as to what was comprehended in Lot 3: and the answer was, that nothing was comprehended in it but the land. Nixon (the agent) swore, he did not hear this. The evidence was rejected: it being held incompetent to the Court to receive any explanation of the particular, and the conditions, to which the agreement, that was signed, referred.

HIGGINSON
v.
CLOWES.

In this case the articles, that are signed, refer to the particulars and conditions: which are to be considered *therefore as ingrafted into the agreement; and whatever question there is upon the import of them is to be decided by construction, not by evidence. The reference to declarations at the sale, supposing it to mean parol declarations, will not vary the case. Conceiving that sales by auction are within the statute, the agreement for the sale must be committed to writing; and the case of *Brodie v. St. Paul* † which has been approved in subsequent cases, shews, that such a reference will not let in parol evidence. I desire not to be understood as delivering any opinion, whether, supposing these plaintiffs had been defendants, the evidence would, or would not, be admissible: ‡ but my opinion is, that clearly upon the part of a plaintiff, seeking performance, it cannot be received. [*523]

The question then is, whether I can decree a specific performance according to the construction put upon this agreement by the plaintiff. No one, who had read only the printed particular in this case (I mean the particular, as contra-distinguished from the conditions), could entertain the idea, that any other timber was to be separately valued, and paid for, than what was upon the Lots 4 and 5. The very declaration, that the timber upon

† 1 Ves. jr. 346.

‡ See the note at the end of this case, *post*, p. 117.

HIGGINSON ^{v.} CLOWES. those lots was to be valued and paid for, implies, almost conclusively, that the timber upon the others was to be included in the lots, and sold with them. That conclusion would be greatly strengthened by the manner, in which the timber upon Lots 1 and 2 is spoken of in the particular; as augmenting the beauty, and of course increasing the value, and the price, to be paid for the lot. Upon the particular I should have thought it clear for the purchaser; but the eighth article of the condition raises a

[*524] question, of which it does not furnish any satisfactory *solution. If it has the general meaning, which is ascribed to it by the plaintiff, the declaration, added to Lots 4 and 5, was unnecessary; for upon that supposition, as the provision now stands, the agreement is, that some of the timber shall be valued; and also that all the timber shall be taken at a valuation: but, that it was unnecessary, is not the worst of that declaration. It had a strong tendency to mislead as to the meaning of the eighth article of the conditions. That is one source of doubt. Another source of doubt is, that this which is contended to be a general provision, is blended in the same sentence with what is admitted to be a particular and restrained provision. The first part applies only to the purchaser of the farm in hand: whereas it is contended, that the second part is to be understood of any purchaser of any lot, upon which timber is growing. It must at least be admitted, that what the plaintiff contends to be the meaning might in various ways have been much more plainly expressed. The express declaration as to Lots 4 and 5 might have so strongly impressed upon the purchaser the idea, that he was to pay for the timber on those lots only, that, even supposing the general words, afterwards so indistinctly and confusedly introduced, would in strict construction bear, and properly bear, the meaning, put upon them by the plaintiff, my opinion is, that it would not be equitable to enforce the specific execution of a bargain, so different from that, which the purchaser might reasonably enough conceive himself to have concluded. If the one might intend to sell upon one set of terms, as he conceives them, and the other intend to buy according to a different set of terms,† there is in reality no agreement between them: at least, none,

† See *Calverley v. Williams*, 1 R. R. 118 (1 Ves. Jr. 210).

which ought to be specifically enforced at the suit of that party, through whose inaccuracy, to say no more, the misapprehension *arises. I cannot therefore decree a specific performance of this agreement according to the plaintiff's construction : but, upon the other hand, I cannot decree a performance according to the defendant's construction ; unless the plaintiff chooses to take it in that manner. If he does not, the bill must be dismissed.

HIGGINSON
v.
CLOWES.
[*525]

Mr. Hart, insisting, that it was not competent to the plaintiff to elect to dismiss his bill, obtained leave to speak to it again, if he could find cases.

On a subsequent day *Mr. Hart* referred to some cases,† in which the Court had held, that a defendant without filing a cross bill might have a specific performance of the agreement ; although the plaintiff might be desirous of having his bill dismissed. But his Honour thought, those cases did not apply ; as here he had not decided, that the defendant's construction was the right one ; but only that, having purchased under a mistake, he should not be compelled to performance at the suit of the party, who had given occasion to the mistake by the ambiguous wording of the particular and the conditions.

The bill stood dismissed.

[*Note.*—The purchaser subsequently filed a bill for specific performance according to his construction (as reported in *Clowes v. Higginson*, 1 V. & B. 524), and the vendor again tendered parol evidence of the auctioneer's declarations, which was rejected on the ground that in the absence of mistake, surprise, or fraud such evidence could not be received to explain or vary a written contract. The Vice-Chancellor (Sir T. PLUMER), however, dismissed the bill without costs on the ground that the construction of the contract was too doubtful for a court of equity to enforce it. The suit of *Clowes v. Higginson*, though founded on the same contract as *Higginson v. Clowes*, and brought to enforce that contract, raised such different points of law that it is thought more convenient to retain the report of that suit in its proper place in V. & B.—O. A. S.]

† E.g. *Fife v. Clayton*, 9 R. B. 220 (13 Ves. 546).

1808.

Aug. 3, 4.*Rolls Court.*
GRANT, M.R.

[526]

ROBINSON v. CLEATOR.

(15 Vesey, 526—528.)

The Court can exercise a discretionary power of advancement of capital for the benefit of a tenant for life.

A trust for A. and his heirs to pay him the interest for life and advance any part of the principal for him, and a gift over of the residue, confers a life interest on A.

MARGARET ATKINSON by her will directed, that all the residue of her real and personal estate should remain in trust for her nephew and godson George Rowland Nicholson and his heirs ; and that her trustees should pay to him half-yearly the interest, dividends and annual proceeds thereof, for and during the term of his natural life. She then proceeded thus :

“ At the same time I vest a power in my trustees that in case they should see it would be for his benefit to advance him when they may have it in their power any part of the principal of such residue for his advancement in life that they will not withhold from my said nephew such assistance as they may deem necessary : but in case no part should be advanced then I direct that my said nephew leaving lawful issue that the said residue shall be divided share and share alike amongst such issue as he may have : but in case my said nephew should die leaving no lawful issue then I direct the same to remain in trust in like manner for the benefit of his two brothers.”

The question, upon a bill filed by the executors, was, what estate and interest the nephew of the testatrix took under the will in the residue of the real and personal estates.

Mr. Hart and *Mr. Kenrick*, for the defendant George Rowland Nicholson, the nephew, contended, that he took *an absolute interest ; that the whole was to be considered as given to him ; unless some good reason could be assigned to the contrary.

Mr. Richards, for the other defendants, insisted, that George Rowland Nicholson took only for his life ; with the exception of what, if any thing, the trustees in the exercise of the direction

confided to them, should think proper to give for his advancement in life.

ROBINSON
v.
CLEATOR.

The MASTER OF THE ROLLS at the close of the argument said, the executors might in the exercise of a sound discretion give the property to the nephew: but it was impossible for the Court to say, it was absolute property in him. The discretion of the executors is a direct negative of that.

THE MASTER OF THE ROLLS :

Aug. 4.

I have found a note of a case, more applicable to this than any that have been referred to; and I have no objection to make such an order, as was there made by Lord THURLOW. That case is *Lewis v. Lewis*.† Thomas Lewis by his will gave to two persons a sum of above 8,000*l.*, upon trust to apply the dividends and *interest to the maintenance of the plaintiff until his age of twenty-one; and afterwards to pay the whole of the dividends, &c. to him for life; and authorized and empowered the trustees at any time, before the plaintiff should attain the age of twenty-six, to raise any sum, not exceeding 600*l.*; and to pay, apply, and dispose of, the same towards or in order to the preferment or advancement in life of the plaintiff or his other occasions as they should think proper.

[*528]

After a decree, directing the accounts, the plaintiff, having attained the age of twenty-one, petitioned for payment of the 600*l.*, as an absolute bequest to him: but Lord THURLOW directed an inquiry, what were the circumstances and situation of the petitioner; and whether they required the advancement of any and what part of the 600*l.*, before he should attain the age of twenty-six; and the Master was ordered to state his opinion thereon to the Court.

I have no objection to that order; which is a confirmation of the opinion I expressed, that this cannot be considered as absolute property, even under the larger words, "or other occasions." †

† In Chancery, 21st January, 1785,
Register book, B. 1784, fol. 89.

† *Keates v. Burton*, 9 R. R. 315
(14 Ves. 434).

1809.
Feb. 17, 18.

WIGHT v. LEIGH.†

(15 Vesey, 564—568.)

[564]

Devise to A. and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughters, and to their heirs male for ever. An estate in tail male in A.

[*565]

ELIZABETH HARRINGTON CHAUNLER, being seised of real estate in the counties of Essex and Surrey, for her life, with remainder to the plaintiff for life, without impeachment of waste, directly as to one moiety, and, as to the other, after a previous limitation to William Martin for life, and to his children, as tenants in common in tail, with remainder, as to her reversion in fee, to the trustees in her marriage settlement and their heirs, upon trust to convey such reversion in fee to the use of such persons, for such estates, &c. as she should by deed or will appoint, by her will, dated the 8th of October, 1794, gave all her real estates in Essex and Surrey to her husband, John Chaunler, in case he survived her, during his life; and after her husband's decease she gave the said Surrey estate to the plaintiff; and after his *death she gave the same to his first and other sons; and in default of male issue then she gave the said estates unto the eldest and other daughters of the plaintiff, and to their heirs male for ever, on condition they should take the name of Wight, and no other.

The testatrix and her husband being both dead, the bill was filed; the plaintiff claiming an equitable estate tail in remainder under the will of Elizabeth Harrington Chaunler; and praying, that the trustees may be decreed to convey the legal estate in remainder in the moiety of the estates accordingly. The plaintiff had four children: his eldest son of age, but out of the jurisdiction; the other three being daughters.

Sir Samuel Romilly and Mr. Roots, for the plaintiff:

The only way, in which a sensible construction can be given to this will, is by giving an estate tail to the plaintiff; who has a legal estate for life now vested in him. * * His sons cannot

† *Qu.* whether this case would be followed under the present law relating to wills.—O. A. S.

take estates tail, the limitation over being not in default of issue of them, but in default of male issue ; which must have reference to the plaintiff, taking the first estate.

WIGHT
v.
LEIGH.

The case of *Doe v. Applin*† has a considerable *resemblance to this ; upon a devise, not so strong in favour of the construction, giving an estate tail to the first taker ; with which the words of distribution “to and amongst,” are certainly so far inconsistent. *Robinson v. Robinson*,‡ is another instance of an estate tail implied from the manifest intent against an express devise for life and no longer.

[*566]

Mr. Hart and Mr. Bell, for the defendants :

* * In this case the general and the particular intention may both be executed by giving the first taker an estate for life only ; which is the legal construction, where there are no words of limitation ; and the intention could not appear in more explicit terms than by a gift to a person, and immediately after his death a limitation over. * * The words “in default of issue male” may apply, not to the plaintiff, but to the immediate antecedent, the first and other sons : a construction more grammatical, more consistent with the general plan of the devise, and approaching, as near as can be, the ordinary language and course of settlement. The conclusion is, that this is an estate for life to the first taker ; with a remainder in tail male to his first and other sons. [They cited *Seaward v. Willock*.§]

[567]

Sir Samuel Romilly, in reply :

Under these words the sons cannot possibly take estates tail : no interest being mentioned in the limitation ; and in default of persons to take under the prior limitation estates in tail male being given to the daughters by express and technical terms.

* * *

THE MASTER OF THE ROLLS :

The evident intention of this testatrix was to prefer all the male issue of somebody, either of the plaintiff, or of his first and other sons, to the daughter : but she has not given such an

Feb. 18.

[568]

† 2 R. R. 336 (4 T. R. 82).

‡ 1 Burr. 38.

§ 5 East, 193.

WIGHT
v.
LEIGH.

interest to any one, as would enable male issue, generally, to take; for all, that is given to the plaintiff, is what amounts in law to an estate for life, and so it is with regard to the estates given to his first, and other sons. It is necessary therefore, in order to effectuate the general intention in favour of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male, to take; which can only be by giving an estate tail either to the father, or to his first and other sons. The male issue intended must, I think, be the male issue of the father, not of the sons. Nothing is before mentioned of any issue male of the sons: whereas there is a certain description of male issue of the father before spoken of, viz. his first and other sons. Therefore the failure of issue male intended must be of issue male of the father, rather than of the sons. When the Court has determined, what is the effect of the limitation, it is the duty of the trustees to convey accordingly; and the construction I put upon this will being, that this is a limitation to the issue male of the father, they must so make the conveyance.

1809.
March 18, 21,
23, 25.

Rolls Court.
GRANT, M.R.

[596]

HEATLEY v. THOMAS.†

(15 Vesey, 596—604.)

Bond of a *feme covert*, as a surety, enforced against her separate estate, under a settlement to her separate use, with power of appointment by will, or any writing, purporting to be her will, and in case she should die in the life of her husband, and without making any will or other disposition, as to the whole or any part, then as to the whole or such part as to which no gift or disposition should be so made, to the persons, who would be entitled by the statute, if she had died intestate and unmarried.

By indentures of settlement, dated the 10th of June, 1788, previous to the marriage of William Johnson and Sarah Smith, widow, reciting, that Sarah Smith was under the will of her former husband entitled to a legacy of 2,000*l.*, which would become payable on the 4th of March next, by John Willes, as executor, and that she was likewise entitled under the said will

† *In re Roper* (1888) 39 Ch. D. 482; 58 L. J. Ch. 31; 59 L. T. 203.

HEATLEY
v.
THOMAS.

to an annuity of 150*l.*, to be paid half-yearly during her life, and that it was agreed, that the said 2,000*l.* and the said annuity should be assigned, settled, and assured, to and for the sole and separate use and benefit of the said Sarah Johnson, as therein mentioned, it was witnessed, that the said Sarah Johnson, then Smith, by and with the consent of William Johnson, for the considerations therein mentioned, did bargain, sell, assign, &c. unto John Willes and James Willes, and the survivor, his executors, &c. the said legacy and annuity, and all arrears, future payments, &c. and all her estate, right, title, interest, property, claim and demand, whatsoever, of, in, to or out of, the same, every or any part thereof; to have and to hold to them, &c. but upon trust nevertheless, and to and for the sole and separate use and benefit of the said Sarah Johnson, then Sarah Smith, during the coverture between her and the said William Johnson, her then intended husband; and farther reciting, that the said legacy did not carry interest, and would not become payable until the 4th of March, 1789, and that it had been agreed, that the principal should remain in the hands of John Willes, at interest at 5 per cent. it was declared, *that the interest should be paid half-yearly during the intended coverture to the proper hands of Sarah Johnson, and for her own sole use and benefit; and it was farther declared, and agreed, that it should be lawful to and for the said Sarah Johnson, at any time during her said intended coverture, by her last will and testament in writing, or any writing purporting to be her last will, to be signed by her, and attested by two or more witnesses, to give or dispose of the said sum of 2,000*l.* and the interest thereof, to such person or persons, and in such shares or proportions, manner and form, as she should think fit; and in case the said Sarah Johnson should happen to die in the lifetime of the said William Johnson, her intended husband, and without making any will or other disposition, either of the whole of the said sum of 2,000*l.* or any part thereof, that then as to the whole or such part thereof, as to which no gift or disposition should be so made by her as aforesaid, the same should immediately on her death in the lifetime of her intended husband, go and be paid to and amongst such person and persons as according to the Statute for the distribution of

[*597]

HEATLEY
F.
THOMAS.

intestates' estates would be then entitled thereto, in case she had died intestate and unmarried.

[*598]

The indenture contained a covenant by William Johnson, with John and James Willes, that the said sum of 2,000*l.* should remain in the hands of John Willes, or be laid out or invested in such other security or securities, from time to time, as Sarah Johnson should, during the intended coverture, by writing under her hand direct or approve: so as the same should be laid out, invested and secured, in the names of John and James Willes, or the survivor, his executors, &c. upon the trusts of the settlement; and that the interest, dividends, or produce thereof, and also the said annuity of 150*l.* should from time to time, during the joint lives of William and *Sarah Johnson, be paid to her own proper hands and use; and, when paid, be used, enjoyed, and applied, by her, without any interference, hindrance, molestation, or disturbance, whatsoever, of or by him the said William Johnson, his executors, or administrators; and farther, that, in case Sarah Johnson should happen to survive him, then and in such case, the said sum of 2,000*l.* or the stock, or fund, or security, in which the same should be then laid out or invested, should be paid, transferred, or assigned to Sarah Johnson, her executors or administrators, together with the interest, dividends, or produce thereof, to and for her and their own proper use and benefit, without any lawful let, suit, hindrance, &c. whatsoever, of William Johnson, or any person claiming under him.

In the year 1802 James Willes borrowed from the plaintiff, Ann Heatley, 700*l.* upon the security of the joint and several bonds of himself, William Johnson and Sarah Johnson; which bond, dated the 18th of February, 1802, was executed by them accordingly; with condition, reciting, that Johnson and his wife, at the special instance and request of James Willes, consented to join in the bond, to be void on payment of the principal and interest in 1805, as therein mentioned; and Sarah Johnson gave a bond of indemnity to her husband.

In January, 1803, the legacy of 2,000*l.* then in the hands of John Willes, was lent to James Willes, upon a mortgage of leasehold premises for the residue of a term of 61 years, commencing in 1792, and upon his bond, and warrant of attorney to confess

judgment; reciting, that John Willes paid the money at the request of Sarah Johnson.

HEATLEY
v.
THOMAS.

[599]

Sarah Johnson, during the life of her husband, made her will, according to her power; and thereby gave, bequeathed, directed, limited and appointed, all her separate estate, property, and effects, over which she had any disposing power, as therein mentioned; and appointed John Thomas and James Willes, her executors. William Johnson, the husband, died on the 13th of March, 1803. Sarah Johnson died on the 22nd of September following, a widow; not having revoked or altered her will. During the life of her husband she had, in August, 1802, out of the savings of her separate property lent James Willes 500*l.* upon his bond, payable in 1805, with interest.

Probate of the will of Mrs. Johnson was granted to Thomas; limited to all her right, title, and interest, in the 2,000*l.* and interest: the 500*l.* and interest, and also all such sum or sums as were or should appear to be due to her by John Willes for the unappropriated interest and savings of the 2,000*l.* while in his hands, and the unapplied part of the annuity of 150*l.*

In November, 1804, a commission of bankruptcy issued against James Willes; under which the plaintiff proved a debt of 519*l.* 6*s.* 6*d.* and received a dividend of 4*d.* in the pound.

The bill was filed against Thomas, and against the executor of William Johnson, the assignees under the commission, and James Willes and John Willes; praying a declaration, that the estates of James Willes and William Johnson, and the separate estate of Sarah Johnson, which she became absolutely entitled to, and for her sole and separate use and benefit, under the settlement were jointly and severally liable to pay the principal and interest, due by the bond to the plaintiff; and that such the estates of William and Sarah Johnson are jointly and *severally liable to satisfy so much as shall not be paid by the estate of James Willes; and praying, that the mortgaged premises may be sold; and the mortgage paid; and that the residue of the debt, due to the plaintiff, beyond the dividends she may receive under the bankruptcy, may be decreed to her out of the estate of William Johnson, and the separate estate of Sarah Johnson.

[*600]

HEATLEY
v.
THOMAS

Sir Samuel Romilly and *Mr. Wear*, for the plaintiff, cited the case of *Standford v. Marshall*;† observing, that the only distinction between the cases was, that there the security was given for the debt of the husband. In *Hulme v. Tennant*‡ Lord THURLOW's difficulty was not upon such a case as this; whether the separate property of a married woman could, in the shape of assets, after her death be liable to her contract; but how it could be got at during life; upon which Lord ELDON also entertained doubt in *Nantes v. Corrock*.§

March 21.

The MASTER OF THE ROLLS said, in this case a doubt had occurred to him, whether the bond could affect the separate property of Mrs. Johnson, according to the late decisions: particularly *Sockett v. Wray*;|| as by the settlement she appeared to have no power of appointing, except by will.

The cause was directed to be spoken to again.

March 23.

For the Plaintiff:

[*601]

The case of *Sockett v. Wray* does not bear upon this. *The question there was, whether during the life of a married woman the Court could apply her separate property according to her engagement; which could not be; unless the act she had done could be considered as an appointment; which was Lord THURLOW's difficulty in the case of *Hulme v. Tennant*, and Lord ELDON's in *Nantes v. Corrock*; as it could not be got at by a sequestration. This property could have been got at according to the settlement; by which Mrs. Johnson was intended to have the power of appointing both the principal and the interest by deed in her life, as well as by will. Though it is not expressly stated, that is clearly an omission; and the intention was so; which is evident from the words that follow; that if she should die in the life of her husband, and without making any will "or other disposition either of the whole of the said sum of 2,000*l.*, or any part thereof, that then as to the whole or such part thereof, as to which no gift or disposition should be so made by her as

† 2 Atk. 68.

‡ 1 Br. C. C. 16.

§ 7 R. R. 156 (9 Ves. 182).

|| 4 Br. C. C. 483.

aforesaid, &c.;" and before that there is a clear disposition to her separate use: so as to make her a *feme sole*, according to the case of *Fettiplace v. Gorges*.† Therefore, though in the former part of the settlement there is not an express power to dispose otherwise than by will, yet the effect of the latter part, coupled with the former, is, that the property is settled to her separate use; and she might have disposed of the principal as well as the interest in her life. In *Sockett v. Wray* Lord ALVANLEY does not intimate, that property, clearly settled to the separate use of a married woman, would not after her death be applicable to her debts, contracted during coverture: the question in that case being whether the property could be taken during her life.

HEATLEY
v.
THOMAS.

Mr. Bell and Mr. Heald, for the defendants:

[602]

The only interest, which Mrs. Johnson had in this subject, as separate property, was for her life; with a power to dispose by will. From the subsequent words, "or other disposition," a power to dispose by deed of what the LORD CHANCELLOR, in *Jones v. Harris*,‡ calls the corpus, cannot be implied. Those words also are confined to the event of her death in the life of her husband. The question is, whether, having that interest for her separate use, with a power to dispose by will only, she could dispose of it in any other way; as she has attempted, by entering into a bond; and, whether, when she survived her husband, this Court will appropriate to that bond this property. No case has gone to that extent. *Hulme v. Tennant*, and the others, have determined, that a married woman, with regard to property, which she has an absolute power to dispose of as a *feme sole*, shall be considered as a *feme sole* for the purpose of charging it with her debts; and the proposition cannot be carried farther either upon principle or authority. In *Jones v. Harris*‡ the LORD CHANCELLOR held that a married woman could be liable only according to the form of her contract; going expressly upon the ground, that there was nothing to affect the corpus. So Mrs. Johnson could not charge the bulk of this property otherwise than by will. This bond could not at any time be considered a valid charge upon her property. If her bond could

† 1 R. R. 79 (1 Ves. Jr. 46).

‡ 7 R. R. 282 (9 Ves. 486).

HEATLEY
v.
THOMAS. during the coverture have the same effect as an appointment, by creating a valid charge, all the caution, used to restrain her appointment by deed, would have been fruitless. Can her death give effect to a bond, which would not have had effect in her life? If she had been restrained from appointing to a particular person, could she have given a bond to that person for payment of his debt? This property could not go *to her husband except by her will. * * *

[*603]

Sir Samuel Romilly, in reply, said, the point in *Jones v. Harris* was as to affecting the property in her life. Even taking her to be a *feme sole* to all intents and purposes, how can the Court take the property in her life? There are no means of doing it; for this is property, that cannot be taken by sequestration.

The MASTER OF THE ROLLS in the course of the argument said, the question was, whether this was separate property to all intents and purposes. In *Sockett v. Wray* Lord ALVANLEY did not consider a married woman, who had only a power of appointment by will, as having separate property; distinguishing that case from *Norton v. Turrill*;† where the creditor was allowed to resort to the separate property after the death of the wife; as she had a power of appointing either by deed or will. Upon the question in *Sockett v. Wray*, whether the wife could give the property to her husband, Lord ALVANLEY held, that she could not; that she could not affect it in any way but by a revocable instrument; and the bond was an instrument not revocable.

If this was absolutely separate property in Mrs. Johnson, upon the plaintiff's construction of the deed, that takes it out of the case of *Sockett v. Wray*; and brings it *to that of *Hulme v. Tennant*; upon which the present LORD CHANCELLOR has expressed some doubt; calling it a prodigiously strong case; and upon another occasion intimating, that, whenever the point shall distinctly occur, those cases would require full consideration.‡ I must look with some attention at this settlement. Much will depend upon its particular expressions.

[*604]

† 2 P. Wms. 144.

‡ *Jones v. Harris*, 7 R. R. 282. See p. 283.

By the decree an account was directed of what remains due to the plaintiff for principal and interest upon the bond; and her costs were directed to be taxed. It was declared, that the estates of the defendant James Willes and of William Johnson, and the separate estate of Sarah Johnson, were jointly and severally liable to pay the principal and interest of the plaintiff's bond; and that the separate estate of Sarah Johnson is now liable to pay so much of what shall be reported due to the plaintiff, as shall not be recovered from the estate of James Willes: (the said Sarah Johnson having given a bond to William Johnson, her late husband, to indemnify him against the plaintiff's demand); and it was ordered, that the same be answered out of her assets; an account whereof was directed. An account was also directed of the separate estate of Sarah Johnson against her executors John Thomas and James Willes, and the assignees of the latter; and an account of her other debts; and a sale and application of the mortgage.

HEATLEY
v.
THOMAS.
March 25.

COLE v. WADE.†

(16 Vesey, 27—48.)

A power to trustees based on personal confidence is *prima facie* limited to the original trustees, and does not pass to others who may subsequently fill the office of trustee, unless an intention to that effect is clearly expressed. A power to A. and his executors passes on A.'s death to his general representatives.

1806.
July 30.
Dec. 10, 11.

1807.
Aug. 11.

Rolls Court
GRANT, M.R

[27]

SIR CHARLES BOOTH by his will, dated the 8th of June, 1792, after giving several legacies and disposing of his copyhold estate, and some specific articles of *personal estate, gave, devised and bequeathed, all the rest and residue of his real and personal estates unto Francis Ruddle and George Wade, whom he appointed executors of his will, their executors, administrators and assigns, upon the trusts after mentioned; and, directing his said trustees and executors to pay out of the residue certain legacies, as to all the residue and remainder of his said real and personal estate, after payment and satisfaction of all his debts, funeral expenses, and legacies and annuities given and secured by him by bond to Joseph Stapley and Ann, his wife, to dispose of the

[*28]

† *Crawford v. Forshaw*, '91, 2 Ch. 261, 60 L. J. Ch. 683, 65 I. T. 32.

COLE
v.
WADE.

same for the use and benefit of such relations and kindred as they in their discretion should think proper and in manner hereinafter mentioned ; and to that end the testator directed his said trustees and executors to make the best inquiry they could respecting his relations and kindred, and to take all such ways and means as they should think proper by advertisement in the public papers and otherwise to discover and find out, who were his relations and kindred ; and, when they should have obtained sufficient proofs to satisfy their own minds, who were his relations and kindred, and to what extent they amounted, he directed his said trustees and executors to convey and dispose of all such residue of his real and personal estate (after certain payments therein mentioned) unto and amongst such of his relations and kindred in such proportions, manner and form, as his said executors should think proper, recommending and advising his said trustees and executors to give the greatest share and proportion thereof unto such person and persons who in their opinion and judgment should appear to them to be his nearest relations and the most deserving : but he declared his will and meaning to be, that such recommendation was not to control them in their discretion ; well knowing and resting perfectly satisfied in the honour and justice of his said trustees and executors : his intention therefore *was, that every thing relative to that disposition, as well who was or were or was not, his relations and kindred, and the proportions they should respectively be entitled unto of the said residuum, should be entirely in the discretion of the said trustees and executors and the heirs, executors, and administrators, of the survivor of them ; and who were not to be under the control in any manner whatsoever in any thing relative thereto ; and for the purpose of better dividing and apportioning the said residue of his real and personal estate he directed his said trustees and executors and the survivor of them and the heirs, executors and administrators, of such survivor, if they should think proper so to do, to mortgage, sell and convey, the residue of his said real and personal estate or such part or parts thereof as they in their discretion should think proper ; meaning to leave it in the discretion of his said trustees and executors to convey unto his said relations and

[*29]

kindred or such of them as they should think proper his said real and personal estate or any part or parts thereof in such manner and form and in such proportions and proportion, or charged with such sum or sums of money by way of annuity or annuities or otherwise to any other or others of his relations and kindred as they in their discretion should think proper: or wholly or only partly convert the same into money for the purpose of dividing the same between his said relations and kindred in such manner as his said trustees should think proper; and he directed, that the said Francis Ruddle and George Wade or the survivor of them, or the heirs, executors or administrators, of such survivor, should pay and divide and convey the whole of the residue of his said real and personal estate to and among his said relations and kindred in manner aforesaid within fifteen years next after his decease; subjecting nevertheless a sufficient part thereof to the security of an annuity of 10*l.* to the said Joseph Stapley and *his wife, and also 10*l.* a year secured to him by his bond.

COLE
v.
WADE.

[*30]

The testator died in 1795. Ruddle and Wade proved the will; took possession of the real and personal estate; and afterwards died: Wade, who was the survivor, having by his will, dated the 2nd of February, 1801, devised and bequeathed to William and Edward Bray all the real estates of Sir Charles Booth, and all the monies, arising therefrom, and all the personal estate of Sir Charles Booth, to hold such real estate to William and Edward Bray, their heirs and assigns for ever, and such personal estate and monies to them, their executors, administrators and assigns, upon trust for the purposes in the will of Sir Charles Booth declared concerning the same; and the testator appointed the said William and Edward Bray his executors for that specific purpose only, and not with respect to any part of his own estate; appointing his wife and another person executors as to his own estates.

The bill was filed by a person, claiming as heir at law and next of kin of Sir Charles Booth at the time of his death, and at the deaths of Ruddle and Wade, prayed, that the plaintiff may be declared entitled to the whole residue of Sir Charles Booth's real and personal estates, &c.

COLE
v.
WADE.

[*31]

The defendants William and Edward Bray by their answer submitted, that with respect to such parts of the trusts of the will of Sir Charles Booth, which related to the distribution of his residuary personal estate, they, as executors, appointed by Wade for the specific purpose of carrying into execution the trusts of the will of Sir Charles Booth, are bound, by virtue of that will to carry the same into execution in the same manner as Wade, as such surviving *trustee, would have been bound to do, within the time, specified in the said will, if he had lived. They suggested, that in consequence of inquiries, made by Ruddell and Wade, various persons had put in claims to be considered as relations and kindred of Sir Charles Booth; and submitted, that an inquiry ought to be directed to ascertain the truth and extent of those claims; in order that the defendants William and Edward Bray may then receive the directions of the Court with respect to the manner, in which they ought to execute the trusts aforesaid, and farther to act as the Court shall direct.

By a decree, pronounced at the Rolls, in August, 1803, the will of Sir Charles Booth was established; and the usual accounts decreed; and an inquiry was directed, who was the heir at law, and who were the next of kin and other relations of the testator, living at the time of his death; and whether any of such next of kin were dead; and, if dead, who were their personal representatives.

In December, 1803, before any report, the plaintiff died; and a bill of revivor was filed by his heirs at law and his executors and residuary legatees.

The Master's report stated, that at the death of the testator and at the time, when the decree was pronounced, the late plaintiff John Cole was the heir at law; and that he, and other persons, named in the report, were the second cousins, and sole next of kin. The report also stated the claims of various persons, as relations of the testator at the time of his death; to the extent of seventh cousins once removed.

The Solicitor - General,† Mr. Richards, Mr. Thomson,

† Sir Samuel Romilly.

Mr. Wetherell, Mr. Hall, and, Mr. Raynsford, for the personal representatives of the original plaintiff, and the other next of kin of the testator, at the time of his death according to the Statute of Distributions. Mr. Hollist, and Serjeant Palmer, for the heirs at law :

COLE
r.
WADE.

The general question is, whether in the event, that has happened, this residuary estate is undisposed of ; or is subject to the trusts of the will ; † and the points, to be considered for the purpose of determining that, are, first, whether the discretion, given by the testator to the persons, named by him, is confined to them, individually ; or can be exercised by other persons, representing them ; and, if it may, whether it must not be executed by their general representatives, real or personal, not by other persons, specially appointed by them for the execution of that particular trust. * * *

Mr. Alexander, Mr. Fonblanque, and Sir Thomas Turton, Mr. Bell, and Mr. Courtenay, Mr. Hart, Mr. Trower, Mr. Toller, Mr. Newbolt, and Mr. Wingfield, for the defendants, relations beyond the limits of the Statute of Distributions, and William and Edward Bray :

[37]

* * The material question is, whether these two defendants, appointed for the purpose by the surviving trustee, have now a discretion to select the objects ; assuming, that, if they have, they may go beyond the statute. * * *

[39]

The *Solicitor-General*, † in reply :

[40]

* * The particular confidence of the testator is not left to conjecture. It is plain from the nature of the trust, expressed in the clearest terms : to ascertain, not only the nearest, but also the most deserving, of his relations. Can he be understood as intending that confidence to pass to persons, perfect strangers

[41]

† In the present state of the law it is thought unnecessary to retain so much of the arguments of counsel as dealt with the question of intestacy, since the case of *Harding v. Glyn*, 1 Atk. 469 (see 4 R. R. 334),

followed in *Brown v. Higgs*, 4 R. R. 323 (4 Ves. 708), had really decided that point in favour of the will.—O. A. S.

‡ Sir Samuel Romilly.

COLE
v.
WADE.

[42]

to him ; and who might be equally strangers to those in whom he reposed confidence. * * *

If these defendants had the capacity of executing this trust, they have renounced it. By their own act inducing the Court to take it up they have precluded themselves from executing the material part of the trust : to ascertain, who are the relations.

* * *

1807.
Aug. 11.

THE MASTER OF THE ROLLS :

The question in this cause arises upon the disposition, made by the will of Sir Charles Booth, of the residue of his real and personal estate, unto and amongst such of his relations and kindred, in such proportions, manner, and form, as his executors should think proper ; recommending and advising them to give the greatest share and proportion thereof unto such person and persons, who in their opinion and judgment should appear to them to be his nearest relations, and the most deserving.

[43]

A disposition of this kind contains a mixture of trust and power. The trust must be exercised for relations and kindred of some description or other. The power of selection belongs to those, to whom the testator has thought fit to confide it. Whether there is any person now entitled to exercise this power, is the principal question : but a trust exists equally, in whichever way that question may be determined. If there is any person entitled to exercise that power, the trust will be for those of the relations and kindred, whom such person shall select : if the power is extinct, the trust is for those, who answer the description of relations and kindred according to the construction, this Court may put upon these words. There is no intestacy : nor any resulting trust. The will makes a complete disposition of all the real, as well as all the personal, estate, upon a trust, to be executed in one or other of the modes I have mentioned. The question is, in which of those modes the trust is to be executed.

The more remote relations, conceiving, that it is only by the exercise of a discretionary power that they can take any part of the residue, contend, that such power is now vested in the Messrs. Bray. Those, who answer the description of next of

kin, maintain the negative of that proposition ; contending, that the Court must, according to its established rules, now execute the trust exclusively in their favour. That the two original trustees, who were also executors, had a power of selection, is not attempted to be denied : but they are both dead. Wade, the survivor of them, devised and bequeathed all Sir Charles Booth's estate, real and personal, to the Messrs. Bray ; and likewise appointed them to be his *(Wade's) executors for that special purpose, and not with respect to any part of his own property.

COLE
v.
WADE.

[*44]

In support of the proposition, that the power passed to the Messrs. Bray, it was contended, that, independently of any more particular indication of intention, a power of this kind to trustees, their heirs, executors, and administrators is not confined to the trustees, originally so nominated ; but passes to all, who may at any time sustain the character. To that position I cannot accede. I conceive, that, wherever a power is of a kind, that indicates a personal confidence, it must *primâ facie*, be understood to be confined to the individual, to whom it is given ; and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong. Of this the case of *Doyley v. The Attorney-General*† is a strong instance. There, though for the very purpose of sustaining and executing the trusts of the will the trust had been assigned by the direction of the Court, the power was held not to have passed to the assignee ; though there was no doubt, that he legally sustained the character as completely, as if he had been at first invested with it.

In the case of *Flanders v. Clark*‡ the executors had a discretionary power as to the time of payment. Lord HARDWICKE, holding, that the surviving executor might execute the power, says, " If that surviving executor had not disposed of it, it would have devolved on the Court to have done it : " not, that the power would have gone to the executor of the survivor : yet in legal consideration the executor of the survivor was the executor of the testatrix.

There is a case in *Moor*,§ in which one of the Judges seems to

[45]

† 4 Vin. 485 ; 2 Eq. Ca. Ab. 194. § Moor, 61, pl. 172.

‡ 1 Ves. Sen. 9.

COLE
v.
WADE.

have thought, that a power, implying personal confidence, would not even by express words pass to executors of an executor. Weston says, This is a special trust and confidence, which the testator put in those, to whom he commits the sale: but he could have no trust or confidence in those, whom he did not know; and he could not know, what persons his executors would make their executors.

The other Judges however differed from him upon this; as the power was expressly given to the executors of the executor; though all concurred, that the authority, being joint, was determined by the death of one.

In this case the power not only implies personal confidence; but that is the declared ground, upon which it is given; and therefore, if there was nothing else in the case I should not feel myself entitled to construe this power to belong to any trustees and executors but the two individuals, who were originally so appointed. But it is then said, the testator has in express words given the power, not only to the original trustees, but to the heirs, executors, and administrators, of the survivor of them; and certainly nothing can be more express than the declaration, that every thing, relating to this disposition, as well who are, or are not, to be considered as relations and kindred, and the proportions they shall take, shall be entirely in the discretion of his said trustees, and the heirs, executors, and administrators, of the survivor. Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power, which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, *yet I am not authorised to strike these words out of the will upon the supposition, though not improbable, that they were introduced in this part by inadvertence and mistake. I do not apprehend, that a bequest, actually made, or a power given, can be controlled by the reason assigned. The assigned reason may aid in the construction of doubtful words; but cannot warrant the rejection of words, that are clear. What may be the effect of the words is a different question. Of that, it seems evident, the testator had formed no distinct conception.

[*46]

The original trustees and executors were the same persons.

COLE
v.
WADE.

All the real and personal estate is vested equally in them. But the heirs and executors of the surviving trustees might be different persons: yet all the directions about the distribution of the residue proceed upon the supposition, that the same persons are to select the objects, and settle the proportions, in which they are to take. But, if the real estate is to go to one, and the personal estate to another, he has left it entirely uncertain, how the power is to be executed. It is however said, this difficulty does not exist in the case; as the Messrs. Bray unite in themselves the character of heirs and executors of the surviving trustee. The question then is, whether the description of heirs and executors does belong to them. That they are not the heirs of Wade is admitted: but it is said, the words are to be understood in the same sense as in the limitation of an estate; and import, that the person, taking the trust-estate, shall also exercise the discretionary power. The testator has not said so; and that could not be what he meant. By so limiting the property he put it in the power of the trustee to pass it by devise, or in any other manner, in which real estate could be conveyed: but he could not mean, that whatever would be an alienation of the estate should be a transfer of the power. In the execution *of the trust they might have occasion to sell the whole estate: but would the power pass from them; and go to the vendee? Will it do to qualify the proposition: to say, the power shall pass with the trust? The case of *Doyley v. The Attorney-General*† is in direct opposition to that; for the estate, with the trust attached to it, was in the new trustee, appointed by the Court; yet the power was held extinct; though given precisely in the words of this will. The power is not appendant to the estate: by itself it is incapable of alienation; and it is only *quasi persona designata* that it can go to the heir. The Messrs. Bray do not answer that description. The power therefore is not vested in them. Whether in any sense they can answer the description of executors of Wade, with whose own property they are not to intermeddle, it is not material to determine; for by themselves the executors could not exercise any portion of the power. In the case of *Doyley v. The Attorney-General* it appears

[*47]

† 4 Vin. 485; 2 Eq. Ca. Ab. 194.

COLE
v.
WADE.

by the Register's book, that Mrs. Turner submitted, "that she, as executrix of Turner, had a right to dispose of Wilson's real and personal estate to the relations of his mother, and in charitable uses:" but no regard was paid to that claim.

[*48]

Therefore this power of selection and apportionment cannot now be executed; and the residuary estate of Sir Charles Booth is to be considered as devised in trust for the relations and kindred of the testator. It is now settled, that, whatever latitude might be taken by a party, having a discretionary power, the Court, executing such a trust, is confined to the next of kin within the Statute of Distribution; any deviation there may have been from that rule in particular cases has depended upon circumstances, that do not occur in this: and, as the distribution *of the residue is not suspended by the existence of any preceding estate for life, those, who are to take, are such as answered the description of next of kin at the testator's death.

[Note.—On appeal by the heirs at law (reported at 19 Ves. 423 under the name of *Walter v. Maunde*) Lord ELDON affirmed the above decision and held that so much of the real estate as remained unconverted under the will devolved thereunder upon the relations (i.e. next of kin), as land and he directed that the costs should be apportioned as between the real and personal estates. The decision on these further points will be found in a later volume of the Revised Reports.—O. A. S.]

1808.
Nov. 16, 17.

1809.
March 24.
April 27.
May 1.

ELDON, L.C.

[49]

PEACOCK v. PEACOCK.†

(16 Vesey, 49—58.)

A partnership without any provision as to its duration may be determined without previous notice.

In a partnership without any stipulation as to the proportions the partners are entitled in equal moieties.

[*50]

A MOTION was made by the plaintiff, that the defendants Lewis Peacock and Thomson may be restrained from receiving the outstanding debts, belonging *to the partnership of the plaintiff

† See now the Partnership Act, 1890, s. 32 (c), as to the determination of a partnership without previous

notice, and see s. 24 (1) as to the equal division of profits between partners.—O. A. S.

and the defendant Peacock; that a receiver may be appointed; that the defendant Thomson may be restrained from interfering in the conduct of the business of the said partnership; that both defendants may be restrained from preventing the plaintiff returning to the house, where the business was carried on, and preventing or molesting the plaintiff in conducting it; and for a production of the books, &c.

PEACOCK
v.
PEACOCK.

The bill represented, that the defendant Peacock had verbally agreed to take into partnership with him in his business of law-stationer the plaintiff, his son: to be entitled in equal moieties, from the 1st of October, 1803. Disputes arising between them, the plaintiff was compelled to quit the defendant's house, where the business was carried on; and the defendant Peacock afterwards took the defendant Thomson into partnership with him.

The defendant Peacock by his answer denied the agreement to admit the plaintiff into partnership.

Sir Samuel Romilly, and *Mr. Leach*, for the plaintiff:
Mr. Hart, and *Mr. Heald*, for the defendant.

THE LORD CHANCELLOR :

1808.
Nov. 17.

Under the circumstances of this case it is clear, that this Court cannot prevent the defendant from forthwith dissolving this partnership. As it is a partnership without any agreement for continuance, it may be dissolved at any time; subject to the proper accounts. The plaintiff also cannot make out, that the house has been so thrown into the partnership, that the defendant cannot consider it his own, and under the circumstances there is no pretence *for representing it as part of the partnership property.

[*51]

(Having considered a point of practice His Lordship continued:)

* * Taking it to be clear at this moment, that this was a beneficial partnership, the plaintiff having a title to a certain, definable, *aliquot* part of the profits, could at the hearing have no more than an account of the profits at the period of dissolution; taking care, that what business is now in execution shall

[52]

PEACOCK v. PEACOCK. be considered as part of the partnership; and that the debts shall be paid. At some period such an account must be taken; and with a view to it the plaintiff is entitled to an investigation before a jury, in an issue, to ascertain, whether he is entitled, and in what share and amount, to the profits of this partnership. * * *

[53] An issue was accordingly directed; and the verdict established, that the plaintiff was a partner, entitled to one-fourth of the profits. The motion was renewed: the defendant having, after the verdict, by a notice in writing to the plaintiff, dated the 11th of March, 1809, reciting the effect of the verdict, declared that the said partnership is and shall be “dissolved upon this day.”

Sir Samuel Romilly and *Mr. Leach*, in support of the motion. * * *

[54] *Mr. Hart* and *Mr Heald*, for the defendant.

[55] *Sir Samuel Romilly*, in reply. * * *

March 29. THE LORD CHANCELLOR :

[*56] The difficulty, which struck me, when this motion was originally made, and which still continues, is of this nature. The father employed his son in his business; and, as is frequently done by a father, meaning to introduce his son, the business was carried on in the name of **“Peacock and Co.”* It appeared to me, that the son, insisting, that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that, as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners, if partners in any thing. In that view the result of the issue, that was directed, appears to be extraordinary. The proposition being, that the son was interested in some share, not exceeding a moiety, the jury in some way upon the footing of *quantum meruit* held him entitled to a quarter. I have no conception, how that principle can be applied to a partnership. The parties however consider themselves bound by that verdict.

[Upon the question of notice to determine the partnership His Lordship said:]

PEACOCK
v.
PEACOCK.

[57]

I have therefore always understood the rule to be, that in the absence of express contract the partnership may be determined, when either party thinks proper: but not in this sense; that there is an end of the whole concern. All the subsisting engagements must be wound up: for that purpose they remain with a joint interest: but they cannot enter into new engagements. This being the impression upon my mind, I had some apprehension from the turn of the discussion here, that some different doctrine might have fallen from the Court at Guildhall: but upon inquiry from the LORD CHIEF JUSTICE as to his conception of the rule, I have no reason to believe, that if this notice had been given before the trial, the jury would not have been directed to find, that the partnership was by the delivery of that paper dissolved. My opinion however being such as I have stated, I can do no more in this unhappy case than restrain each party from receiving the effects of that partnership, determined at the date of that paper, and appoint a receiver of the *outstanding estate. This has so entirely altered the views of both the parties, that it is better that any farther proposition should be the subject of another motion.

[*58]

[The further continuance of the litigation was subsequently compromised.]

TWORT v. TWORT.†

(16 Vesey, 128—132.)

1809.
May 19, 31.

Injunction against waste between tenants in common, on the ground, that one was occupying tenant to the other: otherwise not, except as to destruction.

ELDON, L.C.

[128]

Equitable waste by cutting trees, planted for ornament.

A MOTION was made for an injunction against committing waste by cutting timber and ploughing ancient meadow.

The bill, which also prayed a partition, stated, that the plaintiff and his father and brother, the two defendants John

† *Job v. Potton* (1875) L. R. 20 Eq. 84, 44 L. J. Ch. 262, 32 L. T. N. S. 110.

TWORT
v.
TWORT.

Twort the elder, and John Twort the younger, were entitled as tenants in common under a will : the plaintiff being tenant in fee of one-fourth ; and entitled to another fourth in remainder, immediately expectant on the death of his father ; who was in possession of all the premises with the privity and consent of the plaintiff and the other defendant ; as to the fourth, of which the plaintiff was actually seised in fee, as tenant under the plaintiff by a subsisting agreement or understanding between them ; by which the father was to pay, and from the death of the testator in October, 1806, did pay, for that fourth a yearly rent of 12*l.* 10*s.*

The LORD CHANCELLOR referred to the case of *Goodwin v. Spray* ; † where an injunction against cutting timber, between tenants in common in fee, was refused by Lord THURLOW ; and said, there were subsequent cases : taking this distinction ; that, if one tenant in common is doing merely what any other owner of land might do, the other cannot have an injunction merely on the ground, that he does not choose to do so : but, if it amounts to destruction, the Court will interpose.

[*129]

Mr. Richards, against the motion, mentioned *Smallman* *v. *Onions* ‡ where the injunction was granted on the special ground of insolvency.

Mr. Hart and *Mr. Hall*, in support of the motion, said, as to the meadow, it was clear, that the Court will interfere to prevent that species of waste pending the proceeding for a partition. The other object of the motion, though more doubtful, may be sustained upon the statutes of Gloucester § and of Westminster 2.||

THE LORD CHANCELLOR :

My opinion at present is, that, if one tenant in common thinks proper by agreement with the other to hold the premises as an occupying tenant, the effect of that contract being to exclude the

† 2 Dick. 667.

‡ 3 Br. C. C. 620.

§ Stat. 6 Edw. I. c. 5.

|| Stat. 13 Edw. I. c. 22.

other from entry for any purpose, the tenant thereby has prohibited any act by himself but such as an occupying tenant may do. I shall therefore grant an injunction as to the meadow land; but not as to the other object; unless upon looking into the authorities I can see a ground for it in the old statutes, that have been mentioned. I think, I have refused injunctions between tenants in common, except in special cases.†

TWORT
v.
TWORT.

The motion was renewed as to the timber.

May 31.

Mr. Hart and *Mr. Hall*, in support of the motion:

If this had been, not a mere agreement, but a lease at common law, the plaintiff would have been entitled *to the writ of estrepement; and this Court has gone far beyond the law; to an extent, not to be justified, if it is not to be followed up in this instance. Lord Coke ‡ in his commentary on those statutes, giving the writ of estrepement in every case of waste, most ably explains the learning and the reasons of it. Those statutes have the word “Boscum.”

[*130]

THE LORD CHANCELLOR:

I have had occasion to express my surprise, that this Court did not formerly enjoin in the case of trespass; where there was no intermediate protection; as against waste; and therefore more reason for interfering to prevent irremediable mischief: yet Lord THURLOW long refused an injunction against trespass; and, where a mine, under one field, demised to the defendant, extended also under another field, belonging to the landlord, but not comprised in the lease, had great difficulty in granting the injunction except as to the former; in which there was privity of estate. It appeared to me, that it should have gone to both; and, where the effect was irremediable mischief, I have ventured to do it: but I do not know an instance, where the Court has interfered between tenants in common.

For the motion:

The case in *Moor*§ is this precise case: one tenant in

† *Hole v. Thomas*, 6 R. R. 195 (7 Ves. 589).

‡ 2 Inst. 299, 403.

§ *Moor*, 71, pl. 194.

TWORT
v.
TWORT.
[*131]

common lessee for years under the other ; and it was held by DYER and WESTON, that, where there are two tenants in common, and one leased for years to the other, who commits waste, he shall be punished ; and the lessor *shall recover a moiety of the place wasted. That is a clear authority for the writ of estrepement and the action of waste between these parties ; and this Court has a concurrent jurisdiction, by injunction ; as in many other instances of an equitable proceeding, founded in a legal right ; not contravening, but in conformity to, that right ; and advancing the remedy. This also is the case of landlord and tenant : the contract between them preventing an entry. There is a late instance of such an injunction granted by the Court of Exchequer.

THE LORD CHANCELLOR :

I am much struck with the circumstance, that my experience in this Court does not furnish me with a single instance of an injunction between tenants in common or co-parceners ; and, if from that I could undertake to say, the Court has never granted an injunction in such a case, there would be very strong negative evidence, that this Court has not thought it right to follow by analogy from time to time the common and statute law upon waste, as between persons, standing in those relations. I am also positively certain, that this motion has been made, and refused occasionally ; and have a strong recollection, that I have myself refused to grant an injunction between tenants in common.† Where a case of positive and actual destruction appeared, I granted an injunction ; as that was not the legitimate exercise of the enjoyment, arising out of the nature of the party's title to that, which belonged to him and the other party. With so much negative and positive evidence there is this farther circumstance ; that applications between joint tenants and tenants in common for injunctions against committing what would be waste between landlord and tenant are extremely rare : yet there can be no doubt, that such *a case frequently occurs in fact ; as a person in that relation is much more likely to take that liberty than a common tenant. Another observation is, that

[*132]

† *Hole v. Thomas*, 6 R. R. 195, 7 Ves. 589.

the Court, interfering on the ground of waste, must proceed to apply the principle throughout; to grant the whole equitable relief: for instance, to prevent felling trees, planted for ornament. Consider the consequence of that. It would be a strong proposition, that a tree, planted for ornament, the effect depending upon the difference of taste, shall not be removed by a person, having such an interest: yet this Court, if it touches the subject, must go to that extent. I have therefore considerable difficulty in making a precedent, that is quite original.

There is in this case a specialty, upon which I prevented the defendant from ploughing up meadow; that one of these tenants in common became the occupying tenant of the other: by that contract engaging as to one moiety to treat the land, as an occupying tenant should treat it. If the result of that voluntary obligation on his part is, that he cannot deal with his own moiety, as he might, if he had not incurred that obligation, the question is, whether he must not get rid of that relation, so voluntarily contracted, before he can exercise that original power, which he had, before he entered into that contract. On that ground I shall grant the injunction; stating expressly in the order, that he is occupying tenant to the plaintiff; and restraining him from committing any waste upon the premises, which he holds as such occupying tenant. That is a safe principle; which by its necessary operation will prevent his committing any waste.

TWORT
v.
TWORT.

1809.

July 6, 7.

Rolls Court.

GRANT, M.R.

[168]

HALLIFAX v. WILSON.†

(16 Vesey, 168—173.)

Trust by will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces, equally at twenty-one; with survivorship in case any should die, before his or their shares should become payable; and a limitation over, in case all should die, &c.

Vested interest at the age of twenty-one, before the death of the tenant for life.

The rule of construction adopted in *Emperor v. Rolfe* (see *post*, p. 147) is applicable to wills.†

[*169]

WILLIAM HODGSON by his will, dated the 21st of April, 1796, gave to his friends Thomas and Joseph Wilson all his estate and effects of what nature or kind soever or wheresoever, which he should die possessed of or entitled unto, to hold unto them, their heirs, executors, administrators, and assigns, upon trust that they should with all convenient speed collect the debts, due to him; and, after paying his just debts and funeral expenses, and the legacies, hereinafter mentioned, which he directed to be in the first place paid and satisfied, that they should lay out and invest the clear surplus of the money so to be collected in and upon real securities in the public funds; in trust to pay the interest, dividends, and proceeds *thereof unto his mother Rebecca Hodgson during her life; and from and immediately after the death of his said mother in trust to pay and transfer the said trust monies unto and among his nephew and nieces, Barbara, Thomas, and Margaret, Hodgson, share and share alike: the respective shares of his said nephew and nieces with all accumulating interest thereof, if any, to be paid or transferred to them respectively at their respective ages of twenty-one years; and in case any of his said nephew and nieces should happen to die, before his or their share or shares respectively of in and to the said trust monies and trust premises should become payable, then he directed that the share or shares of him her or them so dying should go or be paid to the survivors or survivor in equal shares and proportions; and if but one survivor then to such only survivor as and to be paid at such times and in such

† *Partridge v. Baylis* (1881) 17 Ch. D. 835; *In re Knowles* (1882) 21 Ch. D. 806. (1888) 38 Ch. D. 183, aff. 39 Ch. D. 426, 57 L. J. Ch. 1007, 58 L. T. 614, and the cases there referred to.—

† On this point see *In re Hamber* O. A. S.

manner as their original shares respectively of or in the said trust monies were so directed to be paid, as aforesaid; and in case of the death of all his said nephew and nieces before the said trust monies should become payable by virtue of his said will, then he gave and bequeathed the said trust monies and trust premises to the said Thomas and Joseph Wilson, their heirs, executors, &c. share and share alike; and appointed them joint executors.

HALLIFAX
v.
WILSON.

The testator died soon afterwards. Joseph Wilson died after the death of the testator. Thomas Hodgson, the testator's nephew, died on the 9th of December, 1807, in the lifetime of the testator's mother; and having attained the age of twenty-one. Margaret Hodgson married; and died under the age of twenty-one. Rebecca Hodgson, the testator's mother, died in 1807. Barbara Hallifax, late Hodgson, attained the age of twenty-one in 1800; and the bill was filed by her and her husband; praying a transfer and payment.

The defendant, the administratrix of Thomas Hodgson, claimed his share, as a vested interest in him at the age of twenty-one.

[170]

Sir Samuel Romilly and *Mr. Wetherell*, for the plaintiffs, contended, that the construction, adopted in the cases, *Emperor v. Rolfe*,† and *Cholmondeley v. Meyrick*,‡ followed by the late cases, *Hope v. Lord Clifden*,§ and *Schenck v. Leigh*,|| upon a limitation over in case of death, before a portion shall become payable, as not preventing the interest from vesting, is confined to portions, strictly speaking, by deed; and has not been extended to a will; that construction depending upon circumstances, not applicable to a will; as the parental obligation to provide for children. In a will the word must have its usual signification.

Mr. Richards and *Mr. Daniel*, for the defendant, insisted, that the construction of the word “payable,” established by those authorities, must prevail in every case of a provision by way of portion, in whatever manner: the limitation as to the time of payment applying to the circumstances of the fund, not to the capacity of the person to take the portion.

† 1 Ves. Sen. 208.

‡ 3 Br. C. C. 253, n.; see 5 R. R. 370.

§ 5 R. R. 364 (6 Ves. 499).

|| 7 R. R. 198 (9 Ves. 300); *Powis v. Burdett*, 7 R. R. 259 (9 Ves. 428); *King v. Hake*, 7 R. R. 266 (9 Ves. 438).

HALLIFAX **THE MASTER OF THE ROLLS :**v.
WILSON.July 7.

[*171]

The only question in this cause is, what is the event, upon which the shares of the nephew and nieces are to go over : whether only the death of either of them under the age of twenty-one ; or their deaths either under that age, or before that of the testator's mother : *in other words, whether, in order to acquire a vested interest, it was necessary, that a nephew or niece should both survive the testator's mother, and attain the age of twenty-one. If no bequest over had been introduced, they would have clear vested interests at the age of twenty-one ; whether they survived the testator's mother, or not. The whole residue is given to trustees, upon trust to pay the interest to the testator's mother during her life ; and after her death to divide the principal among the nephew and nieces of the testator, share and share alike. Upon the authority of a great number of cases that would be in the nature of a vested remainder after an estate for life. In the case of *Roebuck v. Dean*,† where the trust was to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brother and sisters of the testatrix ; and in like manner to the survivors or survivor of them, it was held, that, notwithstanding the last words, the shares of those, who died in the life of the niece passed to their representatives.

The bequest in this case being absolute in the first instance, and not depending upon the contingency of surviving the testators's mother, the question is, whether it is qualified by the subsequent words ; and made to depend upon that contingency. The introduction of a period of payment, by itself, would have had no effect upon the right. A trust being already declared for the benefit of the nephew and nieces, those additional words would only postpone the payment : but then the testator does not mean, that any nephew or niece, who should die under the age of twenty-one, should take a vested interest ; and my opinion is, that all he intended by the subsequent words was to give to those, who should attain the age of twenty-one, the shares of those, who should *die under that age. He has however used the word "payable" : a word of ambiguous import : in one sense, and

[*172]

† 4 Br. C. C. 403.

with reference to the capacity of the persons to take, he had just before declared, that the age of twenty-one was the period, at which their shares were to be payable: in another sense, with reference to the interest of the tenant for life, they could not be payable until her death: but then it is with the direction to pay at the age of twenty-one that the bequest over is immediately connected; and it is to that period of payment, as it seems to me, that the subsequent words are most naturally to be referred. The declaration, that the shares should be paid at the age of twenty-one, naturally led the testator to consider, what was to become of the shares of those, who should not live to attain that age; and then he adds the direction, that the shares should go over. I think, it is no strain to understand him as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment.

HALLIFAX
WILSON.

For this construction it does not appear to me to be necessary to resort to the authority of the cases, that have been alluded to in the argument; though unquestionably the reasoning, upon which those cases proceed, must be just as applicable to wills as to settlements: supposing the object to be similar. Here the object was not strictly to make a provision for children: but the testator, not having any of his own, destines the whole of his fortune to his nephew and nieces; and it is ultimately given over to persons, who are not related to him. However in the cases referred to the difficulty did not merely consist in finding a restricted meaning for the word "payable," though it was necessary in most of them so to do, but it getting the better of other words; which seemed almost expressly to postpone the vesting until after the death of the parent. Whereas here the whole turns *upon the meaning of the word "payable." There is no other difficulty: that word is determined in almost all those cases to be capable of a double construction; and the construction, which I am inclined to put upon it, is that, which seems to me to be most consistent with the testator's intention.

[*173]

The plaintiffs therefore have no claim to the share of Thomas Hodgson; as he attained the age of twenty-one.†

† This decree was affirmed by the LORD CHANCELLOR, on appeal, on the 6th of March, 1812.

1809.
July 11, 12,
 15, 18.

ELDON, L.C.
 [174]

BURGES *v.* LAMB.

(16 Vesey, 174—188.)

Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively without impeachment of waste: with various limitations in strict settlement: all the estates for life being without impeachment of waste; and the ultimate remainder in fee. The trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole.

Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental: viz. an extensive wood.

A tenant for life without impeachment of waste may cut timber generally, in a husband-like manner, independent of the effect upon the beauty of the place, except equitable waste.

[*175] JOHN LAMB, by his will, dated the 19th of June, 1794, devised and bequeathed several estates, particularly described, and all other his freehold and copyhold estates whatsoever and wheresoever, to the use of the *defendant Thomas Henry Lamb, for and during the term of his natural life, without impeachment of or for any manner of waste; with remainder to trustees to preserve contingent remainders: remainder to the first and other sons of Thomas Henry Lamb, successively in tail male: provided he should marry Frances Sawyer, and such sons should be of such marriage; but not otherwise: remainder to the defendant Sir James Bland Burges, for his life, without impeachment of or for any manner of waste: remainder to trustees to preserve contingent remainders: remainder to his eldest son Charles Montolieu Burges for life, in the same manner: remainder to his first and other sons in tail male; with various remainders over to several persons in strict settlement; and the ultimate limitation to — Wray.

The will then, giving the usual powers of leasing to the tenants for life, and directing them to take his name, &c. and giving some annuities and legacies, &c. gave all the residue of his personal estate to the defendants Thomas Henry Lamb, and Sir James Bland Burges, upon trust that they should, as soon as conveniently might be after the testator's decease, lay out and

invest the same in the purchase of freehold or copyhold estates of inheritance in the kingdom of England, and of leasehold estates of long terms, that might lie contiguous to and be useful and necessary to go with the purchase of any freehold or copyhold estate ; and should settle the same to, for, and upon, the several uses, intents, and purposes, and under and subject to the same provisions and limitations as the testator's manor of Ixworth Thorpe, and other his estates, devised therewith, were devised ; and in the meantime and until the said residue should be laid out in such purchases, should permit, suffer, and empower, the person, who for the time being should be in possession of his said manor and other estates by virtue of the limitations *in his will, to receive and take for his own use and benefit the dividends, interest, and produce, of the said residue, in case the same should be laid out within two years next after his death, in the same manner as if it had been laid out in the purchase of freehold and copyhold estates ; but, in case the same should not be laid out within two years next after his death, he directed, that the dividends, interest, and produce, of such part of the said residue as should not then be laid out, should from the end of such two years accumulate, and make part of the said residue : and be laid out and invested in such purchases, as aforesaid. The testator appointed the defendants Sir James Bland Burges, and Thomas Henry Lamb, his executors.

BURGES
v.
LAMB.

[*176]

The testator died on the 20th of February, 1798. In June, 1797, Frances Sawyer married George Smith.

The residue of the testator's personal estate being very considerable, about 70,000*l.*, the executors, contracted for the purchase of an estate at Foxton, in the county of Leicester, at the price of 45,000*l.* ; which purchase was completed in June, 1800. In March, 1803, they contracted for the purchase of the estate and mansion-house of Beauport, with the manor of Oare, in the county of Sussex, at the price of 21,500*l.*, including the timber, which was valued at 1,603*l.* None of the tenants for life after Sir James Bland Burges had issue.

The bill was filed by the eldest son of Sir James Bland Burges ; charging the executors with a breach of trust in purchasing an estate with timber upon it ; stating that the defen-

BURGES
v.
LAMB.

dant Lamb had cut timber, which was ornamental; and the beauty of the place would be much affected by cutting it; and praying an account and injunction.

[177]

Several of the other tenants for life, who had been originally plaintiffs, were struck out; and made defendants. An injunction having issued, upon affidavits, restraining the defendant Lamb from cutting timber, generally, a motion was made upon his answer to dissolve it. Sir James Bland Burges took a lease of the estate at Beauport, for ninety-nine years, if he should so long live, with an exception of the timber; and a reservation to Lamb of the right to enter and cut: but the bill charged, that the defendant Lamb agreed not to cut except for repairs, and decaying timber. The answer denied that agreement; insisting also, that the defendant cut no ornamental trees; nor any thing except such as tenant for life without impeachment of waste may cut: viz. decaying trees, and such as hindered the growth, &c.

Mr. Alexander, Sir Samuel Romilly, Mr. Hart, and Mr. Bell, for the defendant Lamb, in support of the motion to dissolve the injunction.

Sir Arthur Pigott, Mr. Richards, Mr. Wetherell, and Mr. Wingfield, for the plaintiff.

THE LORD CHANCELLOR:

This case brings forward in the shape of a motion a question almost new, untouched by any decision, very little affected by *dicta*, and of as much importance and difficulty as any that I have ever been called upon to consider. If this estate, purchased since the death of the testator, had been the subject of an actual devise with these limitations, the tenant for life without impeachment of waste would have an absolute power over the timber; except as it could be controlled by the interposition of this Court; restraining such an exercise of the legal right as upon its very peculiar doctrine with *reference to the principle of equitable waste is not permitted.

[*178]

The testator has given the residue of his personal estate to two trustees, Thomas Henry Lamb, the first tenant for life of the

real estates, and Sir James Bland Burges, the second tenant for life; upon trust to lay it out in estates of inheritance, to be settled to the same uses; and if that is to be understood, with the same incidents and powers, it imposed upon them the trust, holding an even hand as between themselves and those in remainder, to create the same limitations to Lamb for life, without impeachment of waste; with all the contingent remainders, to be preserved by estates in trustees; and therefore to be attended to by the Court; with many vested remainders to the several tenants for life; and the ultimate remainder to Wray; who has the present estate of inheritance; and the Court is bound to suppose, that no other person may ever have it; so much so, that it would be difficult to maintain, that a decree, binding him, would not bind tenants of the inheritance, who may hereafter come into existence.

BURGES
v.
LAMB.

Admitting, that the purchase of an estate, covered with timber, gives a great advantage to the tenant for life without impeachment of waste, so a tenant for life, subject to waste, may derive great advantage from the nature of the estate; if, for instance, a considerable part of it is covered with underwood, to be cut at the end of twelve years. Assuming, that in laying out the residue of the fund, beyond the amount of the Leicestershire purchase, in the Beauport estate, there is too large a quantity of timber, accessible to the tenant for life, one question has been raised, whether, recollecting, that another subject of purchase is the Leicestershire estate, on which there is no timber, a purchase, *which must be admitted to have been duly made, with reference to all the interest, there is too much timber, considering the two purchases together as an entire administration of the whole trust. It is very difficult to maintain that: yet under an inquiry, whether the Beauport estate was properly purchased, the Master's attention would be applied to that estate alone; as the purchase with that money, which the Court had then to dispose of.

[*179]

Taking the fact to be, that timber, of the value of 1,600*l.* capable of being felled, has been acquired by Lamb, conceiving himself to be entitled to cut, it is clear, that, whatever may be the state of circumstances between him and Sir James Bland

BURGES
v.
LAMB.

Burges, and whatever their agreement, they could not affect the equitable right of this plaintiff against either of them. The ground, upon which the injunction was granted, clearly is not waste in ornamental timber: nor is the language such as the Court adopts in those cases: but I granted the injunction according to the exigency, arising out of the particular circumstances: the estate represented to be full of ornamental timber, in some sense of the word: the value of the timber 1,600*l.*: a great part capable of being cut; and to the amount of nearly 800*l.* actually cut immediately: the defendant therefore bringing back into his own pocket that sum: a large quantity of underwood also upon the estate; which is to be considered with regard, not only to its own value, but also to the timber growing among it; and with reference to that Lord HARDWICKE's opinion in *Knight v. Duplessis*,† is material; that it is not waste to cut timber, when necessary for the growth of the underwood, in which it is situated.‡ It was father represented, that an agreement had taken place between *these trustees; which, as matter of fact, bore directly upon the equity in this cause; that the tenant for life should exercise his right only for repairs, or upon decayed timber: and Sir James Bland Burges took a lease from Lamb, excepting all timber trees; with the right to enter and cut; and a covenant by Burges, that he will cut the underwood at seasonable times to the intent, that Lamb might enter and cut the trees: that instrument dated in July, after a considerable quantity of timber had been cut.

[*180]

Admitting then, that, if this estate had been actually devised in this way, the tenant for life would have all power over the timber, which in law belong to his estate, and in equity also, except such as this Court by a due application of the principle of equitable waste denies to a tenant for life unimpeachable for waste, the question remains, whether this is a due execution of the trust by laying out the money so that under the limitations to themselves for life without impeachment of waste, one of them

† 2 Ves. Sen. 361.

‡ This statement does not give a correct view of Lord Hardwicke's opinion, for he granted an injunction in that case to restrain the

unauthorised cutting as waste, intimating that the sanction of the Court should have been obtained. See *Dashwood v. Magniac*, '91, 3 Ch. at p. 380.—O. A. S.

BURGES
v.
LAMB.

may immediately draw back into his own pocket 1,600*l.* of the trust-money. In a court of equity the mind is rather startled at that proposition. There is very little of decision or *dictum* upon it. In *Lord Archer's* case † land was to be converted into money, to be added to other money, and the whole to be laid out in other land. Lord Archer thought, he was entitled to cut timber upon the land to be sold: but Lord THURLOW held the contrary; though the instrument contained an express declaration, that the rents and profits of the estate, until sold, should go to the persons, who would be entitled to the lands, to be purchased; which was held to *mean the annual rents and profits. That turned upon this; that, as Lord Archer was to be tenant for life without impeachment of waste of the estate to be purchased, if he might commit waste upon the other estate, before it was sold, he would have the benefit of double waste.

[*181]

I cannot deny Lord THURLOW's opinion in that case, that a purchase might be made of an estate, in which the tenant for life, without impeachment of waste, would have the right, to some extent, of cutting timber; and the only rule, left by that case is, that the purchase is to be such as the trustees in a just and sound exercise of their discretion could make: but, if under that act the tenant for life acquired the right to cut some timber, that mere circumstance would not make it an abuse of their trust, or a mistaken exercise of their discretion. *Lord Clarendon's* case is I think, of another sort: viz. an exchange: which is very easily managed with reference to this; comparing the interests in the two estates: but it is otherwise as to personal property, to be laid out in real estates.

The present subject of consideration is, what the Court is to do upon this broad fact; and how if this is an undue execution of the trust, it is to be set right. Can the principle be, that the wood upon the land to be purchased is to be considered as settled estate? That cannot be; as upon the principle, that this sum ought not to be laid out in wood, as the tenant for life, not restrained, may destroy it, the converse is equally true; that it cannot remain wood, if he is restrained from taking any part; and all these other tenants for life may urge, that, if they are to

† *Lady Plymouth v. Lady Archer*, 1 Br. C. C. 159.

BURGES
 v.
 LAMB.

[*182]

be restrained from cutting, that money ought to be laid out in something, from the produce of which they could derive benefit. It cannot be maintained, that *they are to have no benefit, being restrained from cutting, though, if the fund had been laid out in land, they would be entitled to the rents and profits. Then, as to the consequence, is the excess of wood, if any, beyond the proportion of the tenant for life, to be sold? I believe, the precedents are so; and, the consequence would be, that if the injunction is granted upon that ground, to that extent only, setting that right, the tenant for life would be entitled as to all the rest; unless some equity can be raised upon consideration of the beauty or the nature of this estate, preventing the exercise of his legal powers: otherwise, if this estate is such in its nature as the testator has directed, or this Court would direct, to be purchased, the tenant for life without impeachment of waste must have the right to exercise his legal powers, so far as they are not controlled upon equitable doctrine.

If a stronger principle than that is to be applied, what is the intermediate step, short of selling the estate? Orders to cut decaying timber, the produce to be enjoyed during the life of the tenant for life by him, the capital to go after his death to those, entitled to the inheritance, are but of modern origin, by the application of equitable doctrine in cases, where there was no question, whether the estate had been properly purchased, or whether the doctrine might be properly applied. This case has another distinction. The principle, upon which the power of cutting is denied to the first tenant for life, requires the Court equally to deny it to every other tenant for life. Refusing to permit Lamb to cut one stick of timber, I must extend that refusal to all the others; as, if the full interest in the timber cannot properly be given to one tenant for life, though the opportunity for a subsequent tenant for life to take it does not occur so soon, it is impossible to ascertain, how *soon, or to what amount, he may derive undue advantage.

[*183]

The question upon the principle as to ornamental timber, in the extent, to which it has been pushed in this argument, appears to be new; that by building a house near a wood the wood is devoted to the protection of that principle of equity;

and so, the effect of making walks through a wood, is, that no part of that wood is to come down. The Court has not gone farther than protecting what is planted or growing for ornament ; and has frequently refused to act upon affidavits, stating merely, that the timber is ornamental. Upon this subject I have anxiously guarded my expression against the inference, that all the trees, which are ornamental, were within the principle. In the instance of a park, once full of wood, if timber had been felled, leaving vistas and rows, and some scattered trees, it would be difficult to say, the Court would protect the former, and not the latter.

BURGES
v.
LAMB.

Upon these affidavits it is difficult to apply that equitable doctrine. At least the timber must be described, not as ornamental merely, but as planted and growing for ornament. Let this motion be mentioned again at the next seal ; and the other defendants must have distinct notice of it.

The motion was renewed ; and after another argument stood for judgment.

July 15.

THE LORD CHANCELLOR :

July 18.

The question upon this motion is, whether the injunction was properly granted at the time ; and, if not, whether upon subsequent circumstances it can now be sustained. My own opinion is confirmed by the little I have met with upon this very intricate subject : the two cases before Lord Clarendon and Lord Thurlow : the latter proceeding upon a reason, which has a direct application to this case. If this was an improper purchase as to the first tenant for life, it is equally improper in principle, though different in degree, as to every future tenant for life ; and farther, if the strict equity is to prevail, that timber ought not to be comprised in this purchase, or that this is to be treated as ornamental timber, the subject of injunction upon that principle, every future tenant for life has an interest in a degree to say, that this is not the species of purchase, in which the money, with reference to his interest, ought to be laid out.

[184]

The affidavit of the plaintiff does not suggest, that this was not a proper purchase. Admitting the representation of the bill,

BURGES
v.
LAMB.

[*185]

that the timber, which has been cut, is ornamental timber, and that the beauty of this place will be much affected by cutting, I should not be authorized to grant the injunction upon the ground of any proof before me by these affidavits, that any timber was planted or growing for ornament. The injunction granted does not aim at that; not merely preventing the defendant Lamb from cutting timber, planted or growing for ornament, according to the usual terms of those injunctions, but taking the axe out of his hands altogether; restraining him from cutting any thing. Under the alleged agreement that he would cut only for repairs, I granted the injunction in the broad terms, in which it is expressed, *upon the supposition, that, standing that agreement, he had nothing to ask. It is necessary to remark, that the state of the record has been since materially varied. All the plaintiffs, except Montolieu Burges, are now defendants: he remains the sole plaintiff. The question therefore is, whether the injunction can be maintained upon the present state of the record, not as it originally stood: or whether it is to be varied; and to what extent: or whether, instead of upholding this injunction, granted under circumstance so different, with qualifications and conditions, in this very special case the application for a very special injunction should not be the subject of another motion.

The plaintiff must contend, that this timber ought not to have been purchased, either as to the whole, or at least to some extent; and then the effect in equity of that proposition must be considered; as, admitting it to be a due purchase, I must attend to the legal and equitable rights of a tenant for life, unimpeachable for waste; who is at liberty to cut timber, generally, treating it in a husband-like manner, independent of the effect upon the beauty of the place; provided the exercise of that liberty cannot be checked by a due application of the principles, upon which in the contemplation of this Court that is waste, which is not acknowledged as such at law. Then, still regarding this as a proper purchase, is this timber planted or growing for ornament; or serving as shade or shelter according to the meaning of our injunctions? The application of that principle to a wood, covering thirty acres, is carrying it to an extent, of which I do not recollect an instance; and I cannot admit, that it is wiser to

extend, than to confine, these injunctions : on the contrary, if it was to be considered as *res integra*, the wisest course would be to require grantors and testators to say, what their own *injunctions should be ; rather than leave them at liberty to give legal rights : this Court being called on to determine, how the parties, having those legal rights, may be said to execute them equitably. Without saying, that there is no timber in these woods or walks, that may not be protected by the application of these equitable principles, I do not find the fact so made out, that I can maintain the injunction upon that ground.

BURGES

v.
LAMB.

[*186]

If the case is to take the shape, that this sum of 1,600*l.*, or rather (that being vastly beyond what can be stated in equity as the subject of complaint) a less sum, not easily ascertained, ought not to have been so laid out in execution of a trust of this residue for the benefit of the persons, entitled successively under this will, the bill must be framed in another manner ; and directed against all, who are innocently involved in the breach of trust, acting with advice ; treating them all as equally involved in it ; and the relief must be against all. This bill not leading to a proper decision in a case of great novelty, and difficulty, and involving much inquiry, if the motion is to stand upon that ground, the bill should first be set right : but farther, unless in given cases, it is very difficult to maintain, if the principle is, that the timber ought not to have been bought, that it ought to be preserved : the proposition being, that it is not land, or estate of inheritance, that ought to have been purchased ; as there cannot be among all the parties that equal, just, enjoyment, which they ought to have by a due investment of the fund in mere landed property. It is obvious, that Lamb, the first tenant for life, entering into the agreement, that is suggested, did not act according to his strict duty : and Sir James Bland Burges, being upon the same ground under the same obligation, and the plaintiff upon this bill, must submit to the same restraint. That is by no means all ; as these three tenants for *life may be all dead in the course of ten years ; and then the fourth tenant for life may contend, that, if this fund is improperly laid out, it is an injury to him, that he finds the estate such as it is ; and that timber, which it is said he cannot cut, ought to be all arable land ?

[*187]

BURGES
v.
LAMB.

The principle of such a bill is therefore driven to this: that, when the proportion, that such a tenant for life is to have, can be ascertained, all the excess beyond that ought to be removed from the estate; and laid out in that species of subject, that ought to be purchased, not hereafter, but now; as the increase hereafter will give the tenant for life the proper subject and value, when his estate comes into possession; not leaving him open to the variation of the price of timber and other accidents. In the present state of the record therefore this injunction is not to be maintained. Another object also deserves attention. The Court, taking care, that the fund shall be laid out, as Lord THURLOW says, according to a reasonable and sound execution of the trust, must not on the other hand place trustees in such difficulties, that they never can execute a trust of this sort without coming to a court of equity. Here are several tenants for life unimpeachable for waste; and it is very difficult to hit the *ratio*: but, if the timber bears a very considerable proportion to the value of the whole purchase, the tenant for life, especially as he is one of the trustees, cannot possibly be permitted to take it. The Court may be driven to take this course; that trustees, laying out the fund in a timbered estate, without applying that reasonable and discreet attention, that in a fair view ought to be applied to the interests of all parties, should be considered in a court of equity as not buying any timber for their own benefit. That is a mode of cutting the knot, which perhaps in a new and difficult case might be adopted: but, without determining, what might *be the decision upon such a case, my opinion is, that upon this bill the injunction cannot be maintained.

[*188]

WRIGHT v. WRIGHT.†

(16 Vesey, 188—193.)

1809.
July 19.*Rolls Court.*
GRANT, M.R.

[188]

Where a conversion of land is directed for the general purposes of a will, and some of those purposes fail, yet the conversion being effectual, the surplus proceeds result to the heir at law as personal estate.

But where a conversion of land is directed by will for a particular purpose only (*i.e.* payment of debts), all that is not required for that purpose results to the heir at law as land, as if the conversion had completely failed.

SAMUEL WRIGHT by his will, dated the 1st of January, 1790, and properly attested to pass land, according to the statute, left unto his two nephews John Wright and Ichabod Wright, the whole of his real estates whatsoever, to them, their heirs, executors, administrators, and assigns, for ever; in trust for them to sell and dispose of the same; in order to the payment and discharge of all his just debts, “&c.” (that is to say) his house, messuages, farms, and lands, laying at Carlton in the county of York; specifying also some other places; and any other lands and estates; and he directed, that the receipt of his said nephews for the purchase-monies should be a sufficient discharge. Likewise all his property of what nature or kind soever he gave and bequeathed to his said two nephews John Wright and Ichabod Wright and their heirs for ever, in trust to dispose of as follows:—To his dear wife he gave upon his decease 100*l.* with such of his plate, linen, and furniture, as she should choose, not exceeding 400*l.* The will then proceeds in the following manner:

“After the sale of my estates and other of my effects the rest, residue and remainder, except such legacies and other specific sums as I shall by a codicil leave I hereby direct the same to be invested in the hands of *the aforesaid John Wright and Ichabod Wright, in such securities as they think proper; and the interest and benefit as shall arise and accrue therefrom to be paid to my wife half-yearly or as they think proper a sum not exceeding 100*l.* per annum for and during the term of her natural life in case after all my debts and funeral charges, &c. are paid, there shall be so much; and the remainder over and above the said

[*189]

† *In re Richerson*, '92, 1 Ch. 379, 61 L. J. Ch. 202, 66 L. T. 174.

WRIGHT
v.
WRIGHT.

100*l.* per annum I will be carried on for the benefit of my daughter and any such children I have at the time of my decease, or born in due time after, to each share and share alike at the age of twenty-one or day of marriage with consent; and upon the decease of my wife all the property from whence the 100*l.* arises to be divided as aforesaid among my children as that other part is on the age of twenty-one or day of marriage with the consent of trustees and my wife whom I hereby appoint guardian for the persons of any children I shall have. Whereas prior to my marriage I by deed settled to pay my wife an annual sum in case she survived me in lieu of any claim she might otherwise make, this my will amply provides for that. Should it please God that the only daughter I now have living should die and that I have no child living at the decease of my wife my will is that for and during the time of her natural life she my wife shall receive the income of the whole of my fortune so remaining and at her decease the same shall go as by a codicil wrote with my own hand shall direct. I hereby appoint my said two nephews John Wright and Ichabod Wright executors to this my will and residuary legatees for such purpose as this my will directs. Notwithstanding what I have left to my wife as my widow yet I hereby direct that in case she shall marry again from that time she shall not from such marriage receive any more from my fortune than the *100*l.* per annum; and I beg each of my executors will accept of twenty guineas for a ring and my thanks, that will take upon them the trust by this my will."

[*190]

The testator died in December, 1803; not having made any codicil; leaving his widow, and the daughter, mentioned in the will, his only child, surviving. The daughter afterwards died unmarried, intestate, and under the age of twenty-one. The bill was filed by the testator's widow; and the question, made at the bar, was, whether the real estate was converted into personality absolutely; upon which construction the plaintiff claimed the whole residue, as administratrix and sole next of kin of her daughter; or whether the conversion was limited to the payment of the debts, &c.; subject to which, and the interest of the plaintiff for her life, the produce of the real estate would belong to the

defendant, the son of the testator's deceased eldest brother, as heir at law.

WRIGHT
v.
WRIGHT.

Sir Samuel Romilly and *Mr. Bell*, for the plaintiff, contended, that this, as in *Fletcher v. Ashburner*,† was a conversion out and out; not for the mere purpose of paying the debts; in which case according to *Ackroyd v. Smithson*‡ the surplus beyond the amount of the charge would belong by way of resulting trust to the heir; who however takes it as personal property.

Mr. Richards and *Mr. Maddock*, for the defendant, the son of the testator's deceased elder brother, claiming as heir at law either of the testator, or his daughter, *argued, that the inference from the whole will was against the conversion of the real estate into personal for all purposes; that the single object was the payment of debts; and it could not have been considered personal property in the event of the deaths of his wife and daughter during his life; merely that it should go to his next of kin.

[*191]

THE MASTER OF THE ROLLS :

The question is, whether the produce of the sale of the lands is in the events, that have happened, to be considered as real or as personal estate. If nothing more was meant than to make a provision for the debts, all, beyond what was required for that purpose, would remain real estate; and as such would go to the heir. If the intention was to convert it into personal property for all the purposes of the will, though some of those purposes should fail, and though in consequence of that failure part might result to the heir, yet it would result to him as personal estate, and be so considered in a question between his representatives.

In the first instance the testator appears to have had nothing more in view than to make a provision for the discharge of his "just debts, &c." which "&c." may include funeral expenses and legacies: but in the subsequent direction he blends the produce of the real and personal estates, and makes them a joint fund; which

† 1 Br. C. C. 497.

‡ 1 Br. C. C. 503.

WRIGHT he disposes of together, and without any distinction. The first
 v. disposition, after the 100*l.* and the specific articles to his wife,
 WRIGHT. is, after the sale of his estates and other of his effects the rest,
 residue, and remainder, (that is, which shall be constituted after
 and by means of the sale of all his estate and effects) is to be
 invested and placed out in such securities as his executors shall
 think proper. What is to become of it, when so placed out?
 [*192] The first *object is the payment of an annuity to his wife for her
 life, “in case after all my debts and funeral charges &c. are paid
 there shall be so much.” What he had made applicable to the
 payment of his debts, &c. was the whole of his property real and
 personal. He meant the annuity to be a charge on the same
 fund, if enough were left to answer it.

Then “the remainder” beyond the 100*l.* annuity is to be
 carried on for the benefit of his daughter, and such children as
 he may have, share and share alike at the age of twenty-one or
 marriage.

Here is a disposition of every thing, except the 100*l.* per annum,
 allowed to the widow. He then proceeds to dispose of that:
 directing upon the decease of his wife all the property, from
 whence the 100*l.* arises, to be divided among his children at the
 age of twenty-one or marriage.

There he conceives himself, as I apprehend, to have made a
 complete disposition of the whole of his fortune, comprehending
 the produce of his real estate. Every thing was to go to his
 children during his wife's life, except the 100*l.* per annum: but
 then it occurred to him, that his children might not arrive at the
 age of twenty-one, or be married; and that they might all die
 during the life of his wife; and he thinks it right to enlarge her
 income in that event; and what he then gives her is, “the
 income of all his fortune:” that fortune being composed in the
 manner already stated. Then, not meaning to give his wife in
 that event the absolute property, he reserves to himself the power
 to dispose of the capital by a codicil: but he never made one;
 and the question is, to whom the produce of the real estate now
 [*193] belongs. It seems to me, that he had converted that *estate into
 money, either absolutely and to all intents and purposes, or at
 least for the purpose of being applied and distributed in the

manner, directed by his will; and of abiding such ulterior disposition as in case of the failure of children he should think proper to make of it. It is not necessary in this case to determine, whether the conversion be absolute or qualified; because in the events, that have happened, the result with respect to the rights of the parties will be the same. In the one way the mother and daughter would take it, as personal property, distributable as upon an intestacy with respect to the capital; and the mother, as administratrix to her daughter, would now be entitled to her share: in the other the daughter would, as heir at law, take it by way of resulting trust upon a failure of the object, for which the conversion was made: but according to Lord THURLOW's doctrine,† referred to in the argument, it would be personal estate in her; and the mother, as her administratrix, would in that way also be now entitled to the whole.

WRIGHT
v.
WRIGHT.

The decree accordingly declared the plaintiff entitled to the whole produce of the real and personal estate.

WALDO v. CALEY.‡

(16 Vesey, 206—215.)

1808.
Dec. 7, 12.

Rolls Court.
GRANT, M. R.
[206]

Trust by will to pay the income to the testator's wife for life; enjoining her to co-operate with his trustees in carrying his wishes into execution; and directing her with the advice and assistance of his trustees to lay out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife shall judge most worthy and deserving objects; giving a preference always to poor relations.

The object is charity in general; with a preference, but not confined to poor relations: the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the control, of the trustees.

PETER WALDO, by his will, dated the 13th of October, 1795, devised to his wife for her life all his freehold and copyhold estates; and after her decease to the use of the second son of Humphry Sibthorpe, that should be living at the time of her

† *Hewitt v. Wright*, 1 Br. C. C. 86.

‡ *In re Lea* (1887) 34 Ch. D. 528, 56 L. J. Ch. 671, 56 L. T. 482.

WALDO
v.
CALEY.

[*207]

decease, and to the heirs and assigns of such second son : and he gave and bequeathed all his personal estate whatsoever and wheresoever, &c. after payment of his debts, &c. to the defendants Prince and Caley, their executors and administrators, upon the trusts after declared : viz. " Upon trust to pay the neat income, interest, dividends, and proceeds, thereof, from time to time, as the same shall arise, and grow due and become payable, unto his wife, and her assigns, for and during the term of her natural life ; or otherwise to permit and suffer her to receive the same : but nevertheless I do hereby most solemnly enjoin and earnestly desire, and I am thoroughly persuaded from the invariable fidelity and attachment my dear wife has always shewn towards me, that she will, after my decease, with the utmost readiness and cheerfulness co-operate with my said trustees in carrying my wishes into execution ; and therefore having made a *very considerable provision for my said dear wife by this my will, I do direct and desire that she will with the advice and assistance of my said trustees, or the survivor of them, yearly and every year during her life lay out and expend one moiety or half-part of the neat income of my personal estate in promoting charitable purposes, as well those of a public as of a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as my said wife shall judge most worthy and deserving objects ; giving a preference always to poor relations ; " and from and after the decease of his wife, then upon trust to pay, assign, or transfer, all his said personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, after such payment thereout as aforesaid, unto and among all and every the children of Humphry Sibthorpe, and Montague Cholmonley, that should be living at the decease of his wife, except the eldest and second sons of the former, and the eldest son of the latter, equally, as tenants in common, and to their executors, &c. Then after some pecuniary and specific legacies the testator appointed his wife, and Prince and Caley, his executors.

The testator died in January, 1803 ; and the executors proved the will. The bill prayed, that the funds, forming the clear residue of the testator's personal estate, may be transferred

WALDO
v.
CALEY.

to the Accountant-General; and that he may be directed from time to time to pay one moiety of the interest and dividends to the plaintiff Hannah Waldo, the testator's widow, to and for her own use; and to pay her the other moiety in order that she may from time to time apply the same to such charitable objects and purposes as by the will expressed, and to permit her to receive a surplus, arising from the charitable fund, detained by the defendant Caley in the hands *of his bankers, to be applied to the same purposes. The bill complained of a plan of distribution, in which the plaintiff had been prevailed upon by the defendant Caley to join, among several persons, represented as relations of the testator: the plaintiff insisting, that from their situation and circumstances in life they were not proper objects; that she was intended to have the sole distribution and control over the charitable disposition, without any restraint by the trustees.

[*208]

The answer of the defendant Caley insisted, that one moiety of the net income of the personal estate ought to be distributed and disposed of in promoting charitable purposes; giving a preference always to the testator's poor relations; more especially as the property entirely flowed from the testator himself; and he has left relations, who in the defendant's judgment are fair objects of relief; and submitted, that it was not the intention of the testator, that the plaintiff should have the sole, absolute, and exclusive, disposal of the charitable fund; but it was to be disposed of and distributed with the advice and assistance, and subject to the control and interference, of the defendants, the trustees: otherwise the testator's declaration of a preference to his poor relations might be completely frustrated; as the plaintiff might give the whole charitable fund to strangers. The defendant admitted, that he refused the plaintiff's application to him to give several sums to different public charities; submitting, that, as the plaintiff is of a very advanced age, and the whole charitable fund ceases at her death, the balance in the hands of the bankers may be advantageously employed in securing life annuities to such poor relations, whose circumstances may require it: otherwise they may derive a very short and precarious relief from the charitable fund. The answer

WALDO
v.
CALEY.
[*209]

farther submitted, that the plaintiff ought to account for her expenditure and *distribution of the charitable fund from the testator's death ; and that the whole charitable fund, considering the plaintiff's advanced age, and the circumstances of the testator's poor relations, should henceforth be distributed among the poor relations as the Court shall direct.

Sir Samuel Romilly and Mr. Wetherell, for the plaintiff.—Mr. Hart, Mr. Hall, and Mr. Edwards, for the defendants, the trustees.

The cases of *Moggridge v. Thackwell*† and *The Attorney-General v. Doyley*‡ were referred to by the defendants ; contending, that the Court should interfere by directing a scheme to be prepared, for a distribution among the poor relations.

For the plaintiff it was insisted, that those cases were not applicable. In *Moggridge v. Thackwell* the trustee was dead. In *The Attorney-General v. Doyley* there were two objects : relations, not poor relations ; and charitable objects. Charity is the primary object of this testator : poor persons, generally ; with a preference only of his poor relations : the selection to be made by his widow, taking the advice of the trustees ; but not subject to their approbation or consent. The effect of the plan, which the defendant has forced upon the plaintiff, is to convert the testator's charitable intention into a sort of patronage among persons, who cannot be represented proper objects : viz. an attorney : a fellow of a college : a midshipman, &c.

Dec. 12.

THE MASTER OF THE ROLLS :

[210]

I am not much surprised, that some doubt and controversy should have arisen upon this will, with regard to the degree of influence and control, which the trustees and the widow were respectively to possess in the application of the moiety of the widow's income to charitable purposes ; for the intention is rather obscurely expressed, and with some apparent contradiction. From the recommendation to his wife to co-operate with his

† 7 R. R. 76 (7 Ves. 36).

‡ 4 Vin. 485 ; 2 Eq. Ca. Ab. 194.

trustees, it might be supposed, that he was about to devolve upon those trustees some duty, which they were to perform; and in the performance of which his wife might give them her assistance: but in the next sentence he commits the whole trust to the widow herself; and only directs it to be executed with their advice and assistance. Upon the whole however the intention seems to be to vest in her a discretionary power of distributing to such charitable purposes, as she shall think fit; and therefore, though the trustees are to advise and assist, yet, in case of a difference of opinion it is her's that must prevail. Into her hands the whole money is to be paid; by her the distribution is to be made; and by her judgment the fitness of the object is to be determined. There is hardly an opening for them to interfere, except by their advice and assistance. Advice does not include decision: nor does assistance imply the power of control.

WALDO
v.
CALEY.

It is said, however, that, supposing the discretion to be in the widow, yet it is to a degree limited and circumscribed by the direction for the preference of poor relations. The meaning seems to be, not that poor relations shall be preferred to all other charitable purposes; but only, that in the distribution, which she may think fit to make to persons in distress, distressed relations shall have the preference: among the poor, poor relations *shall be preferred. It is said, however, that, to secure the due performance of the trust, a scheme ought to be laid before the Master; and the trust ought to be carried into execution under the direction of this Court. In the cases referred to there was a sum of money, or a residue, to be distributed among some given description of persons. It belonged to the Court to determine, what persons according to legal construction came within that description; and to see, that the whole fund was distributed among the ascertained objects of the charity: but in a case, in which there is so great a latitude of description as in this will, and it is, not a residue, or a sum in gross, that is once for all to be distributed, but part of an annual and temporary income, to be disposed of from year to year, according to a discretion, to be exercised every year, and possibly every day, it seems very difficult for the Court to take upon itself the direction and

[*211]

WALDO
v.
CALLEY.

management of the fund, so to be applied. A scheme must be laid before the Master every year; for the intention was, not that the charitable fund should be applied during her whole life in one, fixed, uniform, and invariable, manner, but that it should be applied from time to time, as proper objects presented themselves for the exercise of her discretion. Where a residue is to be applied, the Court frequently directs a scheme; even where an unlimited discretion as to distribution is left to a trustee; and where consequently a scheme can answer no purpose, but to shew, that the whole fund is applied to the proper objects. In the case of *Supple v. Lowson*† Sir Thomas Sewell states that to be the ground.

[*212]

As it is not in this case alleged, that any part of the fund has been, nor is there any suspicion, that it will be withheld, I hardly think it necessary to impose upon the widow at the expense of the charity the necessity of annually accounting for the employment of the fund before *the Master. The purpose may be answered by reserving to any of the parties liberty to apply, as there shall be occasion, so that, if at any time there shall be ground for supposing, that the fund has not been fairly expended, the Court may be called upon to interfere.

Being of opinion therefore, that the discretion as to the disposition of this fund is in the widow, and not in the trustees, though it is to be exercised with their advice and assistance, and thinking a scheme not necessary, the decree must be according to the prayer of the bill; with liberty for any of the parties to apply; as there shall be occasion.

1809.
May 30, 31.

[215]

The decree was pronounced accordingly. From that decree the defendants appealed to the LORD CHANCELLOR; [which appeal was afterwards abandoned].

† Ambl. 729.

DANIELS *v.* DAVISON.†

(16 Vesey, 249—256; 17 Vesey, 433.)

The possession of a tenant is notice to a purchaser (as between himself and the tenant) of the actual interest the tenant may have, either as tenant, or, farther, as in this instance, under an agreement to purchase the premises.

Specific performance of a contract to sell enforced against a person who had purchased the property from the vendor at an advanced price, with notice of the prior contract. Such subsequent purchaser was ordered to convey on payment to him of the price, which the original purchaser contracted to pay.

THE bill stated the following agreement, executed by the plaintiff and the defendant Davison :

“Memorandum : it is this day, 1st February, 1802, agreed between John Davison, of the East India House, London, and James Daniels, of Ealing, in the county of Middlesex, that the said John Davison shall sell to the said James Daniels, his public-house, called the Plough, now in the occupation of the said James Daniels, together with the garden belonging to the said house, for the sum of 200*l.*, to be paid on or before the 25th of March next ensuing, provided the said premises are copyhold, but if it should appear that any part thereof is freehold, then this agreement to be void.”

The bill farther stated, that the plaintiff, in March, 1802, before the day appointed, tendered the purchase-money ; and demanded a surrender : but the defendant Davison refused to perform the contract ; and sold the premises to the defendant Thomas Rea Cole for 300*l.* ; charging notice of the plaintiff's agreement before the surrender to Cole, and payment of his money ; and *prayed a specific performance of the agreement ; that Cole may be decreed to surrender to the plaintiff : or, if it shall appear, that he is a purchaser without notice, that Davison may account for the difference between the price, stipulated by the agreement, and the sum, at which he sold to Cole.

The defendant Davison by his answer suggested, that some part of the premises was freehold ; and therefore he was discharged from the agreement ; admitting however, that he could

† *Caballero v. Henty* (1874) L. R. 9 Ch. 447, 449, 43 L. J. Ch. 635, 637, 30 L. T. 314.

1809.

March 17.
Aug. 9.

1811.

March 1.

ELDON, L.C.

[249]

[*250]

DANIELS
v.
DAVISON.

not distinguish the freehold from the copyhold. The defendant Cole denied notice of the agreement, until after the bill was filed; which was in October, 1805; and the plaintiff's lease was to expire at Michaelmas following. The answer also admitted that the premises were conveyed to Cole by surrender; the reason of which was represented in evidence to be to save the expense of a lease and release for the freehold part; which could not be exactly ascertained. There was contradictory evidence as to part of the premises being freehold, and upon the point of notice.

[*251]

The LORD CHANCELLOR, when the cause was opened, said, there was a decision in this Court, that possession of a tenant was notice to a subsequent purchaser of an equitable agreement, which the tenant had; preventing the plea of purchase for valuable consideration without notice; and afterwards mentioned the case of *Taylor v. Stibbert*; † where Lord ROSSLYN lays down, that whoever purchases an estate, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have; stating it to have been determined, that a purchaser, being told, particular parts of the estate were *in the possession of a tenant, without any information as to his interest, and taking it for granted to be only from year to year, was bound by a lease that tenant had; which was a surprise upon him; as it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person, with whom he contracted; that the vendor could not transfer the ownership and possession at the same time; that there were interests, as to the extent and nature of which it was the purchaser's duty to inquire.

Sir Samuel Romilly, Mr. Leach, and Mr. Horne, for the plaintiff:

The decision, to which Lord ROSSLYN refers, cannot be found: but the proposition is supported by the known established principle of this Court, that whatever puts a purchaser upon inquiry shall be held notice: and if therefore he knows, that a tenant is † 2 R. R. 278 (2 Ves. Jr. 437); and see *Hall v. Smith*, 9 R. R. 313 (14 Ves. 426).

in possession, he is considered as having notice of the whole extent of his interest; and bound to admit every claim, which could have been enforced against the vendor. This case, though different in circumstances, is in principle the same: a tenant, in actual occupation of the premises, claiming an interest against his landlord, not in that character, but as a vendor. The principle extends to any interest, of whatsoever description, which the tenant may have; binding the purchaser, if, omitting to inquire from the tenant as to the nature and extent of his interest, he takes the representation of the vendor. The difference of circumstances, whether the person, in occupation of the premises is an actual lessee, with an agreement for renewal, or holds only from year to year, with an agreement for the purchase of the premises, raises no substantial distinction. The purchaser, omitting by reasonable *diligence to acquire information of his real interest, is bound to confirm it.

DANIELS
v.
DAVISON.

[*252]

Mr. Alexander, Mr. Martin, and Mr. Finch, for the defendants:

The case of *Taylor v. Stibbert* is not an authority for a decree under these circumstances. In that case the purchaser had actual notice, that the leases contained covenants for renewal; which was the true ground for binding him. The want of all notice distinguishes this case. There is no reason, that the purchaser should extend his inquiry beyond the person, with whom he contracted. The inconvenience would be very considerable, if in a large purchase the purchaser should be obliged to apply to every tenant for the purpose of such an inquiry.

THE LORD CHANCELLOR:

This case involves a point of very great consequence. At this moment I find great difficulty in distinguishing it from the cases of notice. To sustain the plea of purchase for valuable consideration without notice, the defendant must aver, that the vendor was, or pretended to be, seised; and that he was in possession; which would be satisfied by the possession of his tenant. On the other hand if this plaintiff had no lease, but merely this equitable agreement, and had taken possession

DANIELS
v.
DAVISON.

[*253]

under that, the subsequent purchaser could not have made out the averment, that the vendor was in possession. Such an agreement would have determined a tenancy at will. Then as to a tenancy from year to year, which the law favors, is the situation of a person, in possession as such *tenant, different in equity with regard to third persons, if, making an agreement with his landlord to purchase the premises, instead of giving up the possession, and re-entering under that agreement, he retains the possession, without going through that ceremony? If he had quitted the possession for a week, the purchaser could not make out the averment, that the vendor was in possession. Suppose a lease for seven years; with an agreement that at the expiration of certain periods the tenant should have an option to purchase: in the case of *Douglas and Witterwonge* † Lord KENYON held, that the benefit of that agreement should go to the heir: the executor paying for the purchase; and the lessee, when he made the option, was to be considered the owner *ab initio*: a strong decision: but, if another person dealt with the lessor pending the currency of the term, who represented the lessee as tenant under a lease, that would be notice of the lease, and all its contents, including that covenant. Where the original entry was as tenant, can the purchaser protect himself under an assurance from that person, who was once landlord, that the relation between them had not been changed? In equity at least this landlord could not have called for rent. The other might have refused it; and might have claimed under the agreement; as determining the relation of landlord and tenant. If he had led Cole into the purchase, that would have been a different case: but that is not the effect of Cole's answer; which is, that he knew, the plaintiff was in possession; but did not know the nature of his possession; not taking the trouble to inquire, whether he was tenant or purchaser.

[*254]

I have a strong persuasion and recollection, with Lord RossLYN, that there is such a determination, as he asserts in that passage of his judgment ‡ to have been made. *In the West of England leases for lives, with covenant for renewal upon certain terms, are usual. A purchaser, satisfied with an inquiry from the

† 1 R. R. 10 (1 Cox, 167).

‡ 2 R. R. 280 (2 Ves. Jr. 440).

vendor, who gave no farther information, than that the person in possession was tenant for life, would be bound by that covenant.

DANIELS
v.
DAVISON.

THE LORD CHANCELLOR :

Aug. 9.

Upon one point in this cause there is considerable authority for the opinion I hold ; that, where there is a tenant in possession under a lease, or an agreement, a person, purchasing part of the estate, must be bound to inquire, on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact, that he is entitled to that term ; if he does not choose to inquire into the nature of his possession : the tenant being in no fault ; but enjoying according to his title. Then if in the instance of such a term the tenant would be entitled against a purchaser, why is not his title good for a greater interest ? In the case of *Douglas and Witterwonge* the tenant was not bound to know, and did not know, that it was necessary for him to make any communication of the option, which he had by the contract with his landlord to become the purchaser ; and Lord KENYON held, that there was nothing, that could affect his conscience in favour of a purchaser, having no communication with him.† My opinion therefore, considering this as depending upon notice, is, that this tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession. That was the doctrine, laid down by Lord *ROSSLYN in the case,‡ to which I referred ; and I think it right.

[*255]

My judgment on that point lays out of consideration the question, whether, taking Cole not to be affected with notice, Davison, the vendor, is to be considered in equity as holding the money, derived from the second purchase, viz. the difference between the prices, in trust for the person, to whom he had first agreed to sell the estate. The estate by the first contract

† This opinion does not appear in the preceding page.
the accounts of that case referred to ‡ *Taylor v. Stibbert*, 2 R. R. 278.

DANIELS
v.
DAVISON.

becoming the property of the vendee, the effect is, that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate, of which he was so seised in trust; or should not be considered as selling it for the benefit of that person, for whom by the first agreement he became trustee; and therefore liable to account.

It is not however necessary to decide that point; another question being, whether under the actual circumstances this is clearly now a binding contract. Upon the face of the agreement it is binding, if the premises are all copyhold: but, if any part is freehold, there is no contract. This is the express agreement. It is alleged by the defendant, that the whole, or a part, is freehold: but it is contended on the other side, that he ought not to be permitted to say, any part is freehold; and, if he may, yet there is in this cause evidence, that all the premises are copyhold; and, whether sufficient to persuade the Court, that they are so, or not, it ought to be taken as conclusive against the defendant. There is by no means sufficient evidence, that all the premises are copyhold: nor is the circumstance, that upon the second sale *they were bought and sold as copyhold, evidence, that ought to be taken as conclusive against him. In order to decree a specific performance of the first agreement, the subject must be proved, as it is described; and it would be too much to compel the performance, where according to the language of the agreement itself there is no contract.

[*256]

An inquiry was directed, whether the premises are all copyhold, or a part is freehold.

1811.
March 1.

[The LORD CHANCELLOR eventually decreed specific performance and delivered the following judgment on this date as reported at

[17 Ves. 433] 17 Ves. 433.]

I have already expressed my opinion, that the plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him; and, with regard to the subsequent sale by the defendant Davison to the other defendant Cole, my notion is, that the plaintiff has an equity to have a conveyance of the premises from Cole; upon the ground, that Cole must be

considered in equity as having notice of the plaintiff's equitable title under the agreement ; that Cole was bound to inquire ; and therefore, without going into the circumstances, to ascertain, whether he had, or had not, actual notice, he is to be considered as a purchaser of the other defendant's title, subject to the equity of the plaintiff to have the premises conveyed to him at the price, which he had by the agreement stipulated to pay to that defendant ; and that it is competent to the Court to make that arrangement as between co-defendants.

DANIELS
v.
DAVISON.

The plaintiff therefore, deducting his costs out of the money he is to pay, must have such conveyance from one or both the defendants, as the Master shall settle, if they differ : but I can go no farther than to regulate as between the defendants the payment of that money, which the plaintiff is to pay.

STERLING, Ex PARTE.†

(16 Vesey, 258—259.)

1809.
Aug. 7.

ELDON, L.C.
[258]

Attorney's lien generally on papers in his possession : not limited to the occasion, on which they were delivered, without special agreement.

A PETITION was presented by the assignees, under a commission of bankruptcy, to have deeds and papers, belonging to the bankrupt, delivered up by an attorney ; who claimed a lien upon them for his general bill.

An objection was taken on the ground, that these papers were delivered for the purpose of preparing a mortgage ; and the lien was to be limited accordingly.

Mr. Alexander and *Mr. Wear*, in support of the petition.

Mr. Bell, for the solicitor, contended for the general lien ; observing, that there was no instance of an inquiry as to the delivery of the papers ; which with this distinction must occur in every case.

THE LORD CHANCELLOR :

The general lien must prevail. Different papers are put into

† *Colmer v. Ede* (1870) 40 L. J. Ch. 185, 186.

STERLING,
Ex parte.
[*259]

the hands of an attorney, as different occasions *for furnishing them arise. In the ordinary case of lien I never heard of a question, upon what occasion a particular paper was put into his hands: but if in the general course of dealing the client from time to time hands papers to his attorney, and does not get them again, when the occasion that required them, is at an end, the conclusion is, that they are left with the attorney upon the general account. If the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement: otherwise they are subject to the general lien, which the attorney has upon all papers in his hands.

The order was made for taxing the bill; with a declaration, that the attorney has a lien upon the papers in his possession.

1809.
Aug. 4.

ECHLIFF v. BALDWIN.†

(16 Vesey, 267.)

ELDON, L.C.
[267]

Injunction restraining vendor, defendant to a bill for specific performance, from conveying the legal estate.

THE bill prayed the specific performance of an agreement for the sale of an estate to the plaintiff.

Mr. Newland, for the plaintiff, moved for an injunction to restrain the defendant, the vendor, from conveying the legal estate in the premises; on the ground, that the plaintiff might be thus put to expence by the necessity of making another party, when the cause might be just ready for hearing.

The order was made accordingly.

† *London & County Banking Coy. v. Lewis* (1882) 21 Ch. D. 460, 47 L. T. 501.

STAPYLTON *v.* SCOTT.

(16 Vesey, 272—275.)

1809.

July 5, 14, 21.

A purchaser is not precluded from insisting upon an objection to title even though such objection appeared on the abstract, delivered before he filed his bill for specific performance. ELDON, L.C.
[272]

AN exception was taken to the Master's report in favour of the title of the defendants to the premises, for the purchase of which the plaintiff had contracted. The objection arose upon the will of the testator John Nicholson; devising his undivided moiety or half part of the dwelling-house, &c. and all his other shares, proportions and interest, if any, in the premises to the defendants upon trust to sell.

THE LORD CHANCELLOR :

[273]

This is certainly a very singular description by a person, persuaded, that he had the entirety of the premises; and at least imports a doubt, whether he had the entirety, or not. By the evidence before the Master the cause of that doubt was accounted for. There is no circumstance in the evidence, shewing, that he had not the entirety; and, if he had, the words are sufficient to pass it. I therefore think the opinion of the Master in favour of the title right: but the question remains, whether upon the conjecture, that this is a good title, a Court of Equity should compel a purchaser to take it. I will give my opinion upon that, when the cause comes on for farther directions.

The cause came on for farther directions.

Mr. Richards, Mr. Hart, and Mr. Bell, for the plaintiff, insisted, that the doubt was thrown upon the title by the testator himself, under whose will the estate was offered for sale; and the Court could not protect or indemnify the purchaser against the claim of the proprietor of the other moiety; if it was not in the testator; as appeared from the will; though it was not ascertained, where it was.

July 14.

STAPYLTON THE LORD CHANCELLOR :

v.
SCOTT.
July 21.

[*274]

The habit of this Court formerly was, not to refuse the decree for a specific performance, upon the ground, that the title was doubtful. The Court, relying on its own opinion in favour of the title, would not admit any doubt, *detracting from the value of that opinion; and the notion was very generally entertained, that the true way of getting rid of the difficulty, arising from any doubt, was by an appeal to the House of Lords. The course has however varied entirely; and it has been held repeatedly, that, though in the judgment of the Court the better opinion is, that a title can be made, yet, if there is a considerable, a rational, doubt, the Court has not attached so much credit to its own opinion as to compel a purchaser to take the title; but leaves the parties to law. The first modern case of that sort was, I believe, *Shapland v. Smith*; † in which *Mr. Hett* differed from Baron EYRE; and the opinion of the former was confirmed by Lord THURLOW; who however felt the doubt so forcibly, that he refused a specific performance; and unquestionably in many instances since that time it has been refused, where there was reasonable doubt upon the title.

The doubt in general cases has been, not of the same nature as this, but upon matter of law respecting the title: yet, if there is as rational a doubt, whether in this instance the testator had the entirety of the premises, as if the title was affected by an objection of law, I cannot see the ground for a different principle. Considering this question, first, generally, without the special circumstances, it appears, that the testator John Nicholson, who became the owner of the entirety in 1781, made his will in 1801; devising these premises by express description as one undivided moiety; and, instead of describing the other moiety, he devises all his other shares, proportions and interest, if any; not asserting, that he has any, to trustees to sell; and

[*275] it appears by a subsequent *instrument, on which however I do not lay much stress, that the same description followed in each of those subsequent conveyances. Taking the principle to be, that a purchaser shall have a reasonably clear title, can this be so represented? Admitting, that it may be explained by extrinsic

† 1 Br. C. C. 175.

circumstances, that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable, title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. I am satisfied, that it is not.

Upon the special circumstances, it was contended, that this is an agreement, not for the entirety of the premises, but for such interest only as the testator had: but that is not the true construction; and the point was properly abandoned. The next consideration is, whether, the plaintiff having an agreement for the entirety, and having also, before he filed his bill, the abstract, with the special description of the title, the circumstance of his filing such a bill with that knowledge is to bind him in equity. Even if the abstract had shewn, that the vendors had no title, according to the practice he might file the bill; and the blot, appearing upon the abstract previously, is not a circumstance, that will prevent a specific performance, if he chooses to have it. Upon the whole I cannot decree a specific performance.

STAPFYLTON
v.
SCOTT.

COWELL v. SIMPSON.

(16 Vesey, 275—282.)

1809.
July 26.

A solicitor's lien on papers is superseded by his taking security.†

ELDON, L.C.

[275]

BRYAN EDWARDS died in the year 1800; indebted to his solicitors Richard and Robert Shawe for business done and otherwise to a considerable amount. The *defendant, being one of his executors, employed Messrs. Shawe in the affairs of the executorship as solicitors, and also as his own solicitor. In October, 1800, he confessed a judgment as executor for the amount of their demand; but he had not possessed assets, subject thereto, sufficient to discharge it. In 1808 they sent in their bill; and the defendant gave them two notes, payable with interest three years after date: one dated the 1st of October, 1807, for 371*l.* 18*s.*: the other, dated the 1st of October, 1808, for 705*l.* 18*s.* 6*d.*

[*276]

† *Angus v. McLachlan* (1883) 23 Ch. D. 330, 334; *In re Taylor*, '91, 1 Ch. 590, 600.

COWELL
v.
SIMPSON.

The bill was filed against the defendant, as executor, for an account; and the defendant, wishing to employ another solicitor, applied to Messrs. Shawe for his papers; offering to pay the sum of 82*l.* 0*s.* 9*d.* the amount of their bill, delivered for business done subsequent to the settlement in 1808: but they declined to deliver the papers without payment of the money, secured by the judgment and the notes; though the defendant has not since the judgment possessed assets, and the notes are not payable.

A motion was made by the defendant, that on payment of 82*l.* 0*s.* 9*d.* Messrs. Shawe may deliver up on oath all deeds, books, papers, &c. belonging to the defendant; insisting, that by taking the personal security of the defendant for the other demand, they had relinquished their lien.

Mr. Bell and *Mr. Horne*, in support of the motion:

[*277] The question is, whether a solicitor, who takes a security, thereby exempting his bill from taxation, and obtaining interest, does not forfeit his lien; which is a disadvantage in this respect, that it prevents the claim of interest. The principle is, that by taking a security the *right by the general law, not founded on the special contract, is gone; and, these being negotiable securities, they may have received actual payment.

Sir Samuel Romilly and *Mr. Hart*, for the solicitors [cited *Mackreth v. Symmons*,† and an unreported case of *Clock v. Bamfield*, at the Rolls in 1802, referred to in the judgment, *post*, p. 185].

[278] THE LORD CHANCELLOR:

This is a question of extreme importance and considerable difficulty; and I should have felt great relief, if I had found the case before the Master of the Rolls a precedent: but it has no application to this. It is now very well settled, that if an estate is sold in this Court, and nothing more passes, the vendor, though he has conveyed the estate, has a lien for the purchase-money. The older cases with reference to this particular species of transaction seem to have aimed at this distinction: which I collected, as borrowed from the civil law; that a security *for

[*279]

† *Ante*, p. 85 (15 Ves. 329).

the money puts an end to the lien: the special contract superseding the implied contract: but there are many decisions in this Court against that. I am not sure however, that the doctrine as to vendor and purchaser will apply to this case. I remember being in some degree distressed at finding, with regard to questions of lien as to other property, not real estate, a great deal of doctrine, undisturbed, that by taking a security the lien was given up; and the express contract determined the implied one.

COWELL
SIMPSON.

Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and farther, for work upon other goods, not then in his possession, having been delivered over, according to the usages of different trades, it is settled by modern decisions, that by taking a security the lien is gone, even with regard to the goods in his possession; and cannot accompany that special security; which determines the implied contract. It is necessary to see, upon what principle that stands. I rather think, it is not regulated by the usage of trade. It has been accounted for in this way; that the lien is gone by the effect of the intention to substitute the special contract for the implied one: the necessities of mankind requiring, that the goods should be delivered for consumption, it is not to be presumed, that the lien was to be extended through the whole period; which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have however heard that denied; and it has been put upon a rule of law, that the special contract removes the implied one: but, if that is the ground, this case would deserve much consideration. The solicitor taking a security, which has three years to run, as the client may have occasion for his papers, there is as much reason, that the lien should not accompany the security through that *period, as in the instance of a trade: and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld. I am not at present satisfied that this lien exists.

[*280]

THE LORD CHANCELLOR:

July 26.

I regret, that this motion is made at a period, when I cannot

COWELL
v.
SIMPSON.

have the assistance of the Judges. With regard to the doctrine of lien in this Court as it affects the purchase-money of an estate sold, I have stated what occurred to me in the case of *Mackreth v. Symmons*; † which is now the subject of a re-hearing: but my opinion is not, that this case is to be decided by analogy to that part of the doctrine of lien: that doctrine having been applied much farther in the instance of the purchase of an estate, whatever doubt was originally entertained upon that transaction, than in any other case.

The practice with regard to the lien of an attorney upon papers is not very ancient. Lord MANSFIELD‡ states that expressly; and that he had argued the question in the Court of Chancery; and Sir James Burrow mentioned the first decision, which established it in a Court of law by analogy to other cases of lien. Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate, with reference to which it has in a series of decisions been extended, it may be described as *primâ facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment he loses the lien. In various trades *the demand being for work and labour, applied in some instances upon the particular goods, and others upon other goods also, though the possession had been given up, it is universally laid down, that if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other. The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security of an engagement to deliver the goods without payment is necessary: otherwise from a promissory note, payable in three years, a contract must be implied, that the goods are to be retained during that period; destroying the other special contract. So, in this instance, if the solicitor says, he will not proceed in the business, and will not deliver up the papers, the consequence

[*281]

† *Ante*, p. 85.

‡ Doug. 104.

is, that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact, that he has taken this security, you can imply, that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary, that he is to deliver them up, and rely on the other contract.

COWELL
v.
SIMPSON.

I do not enter into the question, whether he was obliged to go on, farther than to observe, that a client at law cannot change his attorney without leave of the Court; and there is no mutuality, if the attorney has an absolute discretion to relinquish the cause. Suppose a sum of money declared to be due by decree or judgment: it is *clear according to the established rule of lien, and the practice, that the attorney may give notice to the defendant not to pay the money, until his costs are satisfied. How can that lien be consistent with a special agreement to give credit for three years, receiving interest? He must either abandon that contract; or claim under it, and his lien also; insisting, that notwithstanding that contract he will not permit the client to receive the money for three years. The proposition, that the lien can exist after such a special contract necessarily involves a contradiction to that contract.

[*282]

My opinion therefore is, that, where these special agreements are taken, the lien does not remain; and whether the securities are due, or not, makes no difference. The case at the Rolls has no application. Business has been done by the attorney during a course of years. At a particular period security was given; and afterwards the residue of the money was paid. A second settlement took place; and the balance was secured by bond, payable in 1801. There was no demand beyond that bond except 11*l*. The bond became due: and under those circumstances a petition was presented, not disclosing those facts; praying a general taxation of the bills; which could not possibly be due. To make that case similar to this the application should have been previous to the time, when the bond was due; submitting, whether, as a bond had been given, though it was not due, the lien could remain.

COWELL
v.
SIMPSON.

The order was made accordingly, that on payment of 82*l.* 0*s.* 9*d.* the solicitor should deliver up the papers, belonging to the defendant either in his own right, or as executor.†

1809.
Nov. 6, 7, 9.

ELDON, L.C.

[338]

THE ATTORNEY-GENERAL v. NICHOL.‡

(16 Vesey, 338—343.)

An injunction against darkening ancient windows is not granted in every case that would support an action. The effect must be such material injury, amounting to nuisance, as should upon equitable principles be prevented.

THE object of this information, filed at the relation of the Scottish Hospital, was to restrain the defendant from building up a certain wall, erection, or building, above the height of sixteen feet, and thereby obscuring and darkening the ancient lights of the Scottish Hospital.

An injunction was obtained on the 15th of July, without notice, upon affidavit and certificate of the information filed. The Hospital is situated in Crane Court, Fleet Street; where the defendant occupies some adjoining premises, for the purpose of carrying on his business, as a printer: the wall, which was the subject of complaint, being, not opposite, but at right angles with the Hospital. The affidavits represented, that the relators gave notice to the defendant not to raise the wall higher than sixteen feet; that notwithstanding that notice he proceeded; and had carried it up to twenty feet; that the ancient windows of the Hospital are by this wall darkened and obscured; and if it should be carried higher, they will be to a greater degree darkened and obscured; and so *much as materially to affect the value of the premises. The relators had brought an action.

[*339]

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† See as to this lien, *Ex parte Sterling*, ante, 177. In *Stevenson v. Blakelock*, 1 Mau. & Sel. 535, the Court of King's Bench seems not perfectly satisfied with *Cowell v. Simpson*: but it was confirmed by the LORD CHANCELLOR on *Stevenson*

v. Blakelock, being cited in *Brydger v. Brydger*, 17th of April, 1815, in Chancery. MSS.: Mr. Beames.

‡ *Aynsley v. Glover* (1874) L. R. 18 Eq. 574, 43 L. J. Ch. 777, 31 L. T. 219.

Sir Samuel Romilly and *Mr. Joseph Martin*, for the defendant, in support of the motion, to dissolve the injunction :

The jurisdiction by injunction against stopping up ancient lights, notwithstanding the common law remedy by action, or otherwise, is not disputed : but for that purpose the effect of the erection must be a total deprivation of light : not merely an obstruction : so that the plaintiff has not so much light as he previously enjoyed. The ground for the interference of this Court by injunction is irreparable injury to every useful purpose : not *merely the inconvenience, that may be sustained by intercepting the light in a certain degree. This, if once admitted, may be pushed to a great extent. The addition of one story to a house in a narrow street must in some degree darken the opposite houses. In *The Fishmongers Company v. The East India Company*† Lord HARDWICKE's reasoning does not apply to the distinctions between an injunction and ordering the wall to be taken down ; and the application was refused as to both objects.

The circumstances of this case are peculiar. There is an area of eighteen feet in front ; and this building is, not directly in front, before the windows of the Hospital, but on one side, at right angles, with an interval of seven feet ; diminishing certainly, but not excluding the light. The single question is, whether this is a nuisance ; and if there is any doubt, the Court will not interpose in this summary way.

Sir Arthur Piggot, *Mr. Alexander*, and *Mr. Clason*, for the relators, argued, that the right to an injunction cannot depend upon the position, or the distance, of this building ; nor is it necessary, that the light should be wholly intercepted ; if, as the affidavits state, the effect is, that these ancient lights are darkened and obscured ; and, if the building shall be carried higher, will be in a greater degree darkened and obscured ; so much as materially to affect the value of the premises.

THE LORD CHANCELLOR :

With regard to the jurisdiction of this Court many of the circumstances, that have been pressed in the argument, lay no

† 1 Dick. 163.

THE
ATTORNEY-
GENERAL

v.
NICHOL.

Nov. 9.

[340]

[*341]

THE
ATTORNEY-
GENERAL
v.
NICHOL.
[*342]

foundation for it. Cases may exist, upon which this Court could not interfere: yet an action upon *the case might be very well maintained. The wall between a man and his neighbour may belong to the one, both in respect of property and the obligation to repair: and yet the other might support an action on the case for making a window in it, or for raising the wall: but the consequence does not follow, that a court of equity has any jurisdiction. The foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord HARDWICKE,† that sort of material injury to the comfort of the existence of those, who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. Assuming therefore, that from circumstances of enjoyment, usage, or interest, some contract could be implied, that this defendant should not build upon the premises he occupies, to the east of the Hospital, and that an action on the case could be maintained upon that ground, that would not induce this Court to interpose by injunction; unless the consequences of the act, which may be represented as illegal, being a violation of contract, express or implied, appeared to be such as should be, not merely redressed, but prevented by application of the peculiar means of this Court.

[*343]

I repeat the observation of Lord HARDWICKE, that a diminution of the value of the premises is not a ground; and there is as little doubt, that this Court will not interpose *upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings, darkening those opposite to them, but not in such a degree that an injunction could be maintained: or an action upon the case; which however might be maintained in many cases, which would not support an injunction. These affidavits therefore, stating only, that the ancient lights will be

† 1 Dick. 164.

darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do. Farther, the affidavits and the information regard only the case of a perpendicular building, with a wall twenty feet high ; which might have an effect so injurious, that it would be restrained ; though a lower elevation, with a sloping roof, would let in so much light, that the interposition of this Court would not be justified : and upon the proposal, now made, limiting the wall to sixteen feet, I have no rule for determining to what elevation under twenty feet it may be carried without any injurious effect. Considering also the particular circumstances, in which the defendant is represented as standing with reference to his business, and that they have got so near a decision,† which I should be very unwilling by my interference to retard, I will dissolve this injunction ; the defendant undertaking, if upon the trial, promptly had, the verdict shall be against him, to remove such building as shall be proved in a material and improper degree affecting these ancient lights.

THE
ATTORNEY-
GENERAL
v.
NICHOL.

The defendant gave the undertaking accordingly.

† An action on the case by the Hospital was depending.

1809.
Dec. 8, 12,
13, 18.

ELDON, L.C.

[356]

INNES v. JACKSON.†
JACKSON v. INNES.

(16 Vesey, 356—371.)

Husband and wife, seised under a settlement of the wife's property for their lives successively with remainders in strict settlement, and an ultimate remainder to the wife, in fee simple, subject to a joint power of revocation and new appointment, having no issue, joined in a mortgage for a term of 1,000 years, to be void on repayment by husband and wife or either of them their or either of their heirs, executors, administrators or assigns, and they also thereby covenanted to levy a fine to enure to the mortgagee during the term, and after the determination of the term to certain uses thereby declared with an ultimate use to the survivor of the husband and wife in fee simple. A fine was levied accordingly.

Held by Lord Eldon, L. C., that the wife's heir was entitled to the property as against the devisee of the husband who had redeemed the mortgage and survived his wife. But this decision was reversed on appeal by the House of Lords (*Jackson v. Innes*, 1 Bli. 126), with the concurrence of Lord Eldon, L. C., on the ground that the intention to change the use sufficiently appeared from the declaration of the uses of the intended fine, which clearly indicated an intention beyond the purposes of the mortgage.

By indentures of lease and release, dated the 17th and 18th of July, 1748, previous to the marriage of Richard Jackson and Ann Willoughby, it was witnessed, that in consideration of the marriage, and for securing a competent provision for Ann Willoughby and the issue, and for settling the several lands, &c. after mentioned, to the uses, &c. after mentioned, Ann Willoughby conveyed to Gilbert Jackson and Thomas Lisle and their heirs two farms, at East Knoyle, called Lye Farm and Burnthouse
[*357] *Farm, of which she Ann Willoughby was seised in fee-simple, and all other her real estate therein mentioned, to hold to them, their heirs and assigns, to the uses, &c. after declared: viz. to the use of Ann Willoughby, her heirs and assigns, until the marriage; and, after the marriage, as to Lye Farm and Burnthouse Farm, to the use of Richard Jackson for his life, without impeachment of waste; with remainder to trustees to preserve contingent remainders: remainder to Ann Willoughby for life, without impeachment of waste: remainder to trustees to preserve

† *Jones v. Davies* (1878) 8 Ch. D. (1877) 6 Ch. D. 218, 46 L. J. Ch. 384, 205, 47 L. J. Ch. 654, 38 L. T. N. S. 37 L. T. 64.

710; *Dawson v. Bank of Whitehaven*

contingent remainders : remainder to the first and other sons in tail male : remainder to the daughters, as tenants in common in tail ; remainder to the use of Ann Willoughby, her heirs and assigns for ever. Other premises, situated in Shaftesbury, were settled upon the trusts, afterwards declared concerning certain leasehold and mortgaged premises ; and, as to the South Sea Annuities, a trust was declared for Ann Willoughby until the marriage ; and afterwards to permit her husband to receive the dividends during his life ; and after his decease to permit his wife to receive the dividends for life ; and after her decease to divide the stock among the younger children of the marriage in equal proportions ; and in case there should be no younger children, to the person or persons, who, at the decease of Richard Jackson and Ann Willoughby should be entitled to the said premises at East Knoyle by virtue of the uses aforesaid.

The settlement contained a proviso, that it should be lawful for Richard Jackson and Ann Willoughby during their joint lives by any deed or deeds, writing or writings, under their hands and seals, and executed by them in the presence of two or more credible witnesses, to alter or revoke all or any of the uses, before limited, of said farms and premises at East Knoyle, and to limit any new *uses in lieu thereof. The same power was given as to the stock. Powers of leasing were also given to the husband and wife ; and for a separate provision for her she conveyed to the same trustees certain premises described, and all other her real, leasehold, and personal, estate, in trust for her sole and separate use, subject to a power of appointment by her ; and in default of appointment, for the wife, her heirs, executors, &c.

All the issue of the marriage died infants during the lives of their parents. By indentures, dated the 25th of November, 1745, Richard Jackson and his wife demised the Lye Farm and the Burnthouse Farm for one thousand years, to be void on payment by Jackson, and Ann, his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, of 200*l.*, lent to Richard Jackson by Child, with interest. Richard Jackson afterwards borrowed 400*l.* more from Child ; which sum also was by indentures, dated the 31st of December, 1745, and the 1st of January, 1746, charged upon the same premises fo

INNES
v.
JACKSON.
JACKSON
v.
INNES.

[*358]

INNES
v.
JACKSON.
JACKSON
v.
INNES.

the residue of the term ; with a similar proviso for redemption by Richard and Ann Jackson, &c. Jackson and his wife also covenanted to levy a fine ; which, it was declared, should enure to Child during the term ; subject to the said proviso ; and, after the expiration or sooner determination of the term, to the use of Jackson and his wife for their lives, and the life of the survivor, and after both their deceases to the use of the heirs of their bodies, and, for default of such issue, to the right heirs of the survivor of Jackson and his wife ; with covenant for farther assurance.

[*359] A fine was levied accordingly. Richard Jackson afterwards paid off the mortgage ; and took an assignment of the term, and a reconveyance of the estate to himself in fee. Ann Jackson died in 1772 without issue ; leaving *her husband surviving ; and John Cooth, her heir at law, who died in 1776 ; leaving Charles, his eldest, and Edmond, his second, sons. Charles Cooth borrowed 600*l.* from Richard Jackson ; to secure which sum by indentures, dated the 15th and 16th of January, 1784, reciting, that the premises, after mentioned, would descend to Charles Cooth after the death of Richard Jackson, who was entitled thereto for his life, as tenant by the curtesy, Charles Cooth granted the reversion of the Lye and Burnthouse Farms to Jackson and his heirs, subject to redemption on payment of 600*l.* and interest.

Charles Cooth, not having paid the mortgage, died in 1786 without issue ; leaving his brother Edmond his heir at law ; and having by his will, dated in 1782, devised all his reversionary interest in the Lye Farm to Hester Bower, her heirs and assigns : whom he appointed his executrix. Richard Jackson died in 1796 ; having by his will, dated in 1795, devised all his lands in East Knoyle to the defendant Gilbert Jackson, in fee-simple, charged with some annuities. Hester Bower died ; leaving the plaintiff Innes her heir at law.

The bill in the first cause was filed by Innes and Edmond Cooth ; praying an account and redemption, and a reconveyance by Gilbert Jackson of the Lye Farm to the plaintiff Innes, and of the Burnthouse Farm to the plaintiff Cooth ; suggesting, that the reservation of the equity of redemption by the indentures

of 1746 to the survivor of Richard Jackson and Ann, his wife, was a mistake or inadvertence of the person, who prepared the deed ; or an imposition on Ann Jackson ; as she had no intention of parting with the inheritance of her estate farther than to assist her husband in making a security to Child for the loan of 400*l*.

The defendant Gilbert Jackson by his answer represented, that the object of the fine was, beyond the mortgage, for the purpose also of destroying the ultimate limitation to the heirs of Ann Jackson ; that, the mortgage to Child having been paid off by Richard Jackson in 1754, the chirograph of the fine and indenture of 1746 were delivered up to Richard Jackson ; and were afterwards lost or mislaid by him ; and were missing for a great number of years ; that Richard Jackson, during the whole time they were missing, apprehended, that for want of them the premises would descend to the heir of Ann Jackson ; as if the fine had not been levied, or the deed executed ; and under that mistake the mortgage was taken from Charles Cooth ; insisting, that, as that mortgage was executed under mistake, and with the idea, that, if the deeds should not be found, Cooth would be entitled, and, as they have been since found, and are now in the defendant's custody, the said mortgage was void ; and the plaintiffs have no right of redemption.

The cross bill, filed by the defendant Gilbert Jackson, represented, that Richard and Ann Jackson, in January, 1746, agreed to revoke their former uses in their marriage settlement respecting the mortgaged premises ; and to resettle the same ; and that having about the same time occasion for the farther sum of 400*l*., they borrowed that sum from Child ; and Jackson also executed a bond and warrant to Child for the sum of 600*l*. The cross bill farther stated, that Ann Jackson by her will, dated the 16th of December, 1770, and duly executed, gave and devised to her husband Richard Jackson, her heirs and assigns for ever, all her estate, real and personal, to be entirely at his disposal after her decease, by deed, will, or otherwise, as he shall think fit ; and she did thereby bar all her right, claim, &c. as far as in her lay, against all other persons whatsoever ; leaving him said Richard Jackson *her sole executor and possessor in fee of all, that she should die possessed of, or in any wise entitled to.

INNES
v.
JACKSON.
JACKSON
v.
INNES.

[360]

[*361]

INNES
v.
JACKSON.
JACKSON
v.
INNES.

The prayer of the cross bill was, that the mortgage of 1784 may be declared to have been executed by Richard Jackson under such mistake, as before-mentioned, and to have been afterwards abandoned and given up; and that the defendant may be decreed to deliver up the deeds, to be cancelled, and assign the term. * * *

[362] *Mr. Richards, Sir Samuel Romilly, and Mr. Heald, for the plaintiffs in the original cause :*

[363] * * Here is no evidence of an intention to carry the fine farther than the object of creating a security to Child, the mortgagee: on the contrary all the positive evidence is against that: the fine to be levied upon the request of Child, his executors, &c. The conclusion upon the deed is, either that the parties were ignorant of the limitations of the settlement, or that an imposition was practised upon the wife by the representation, that a fine was necessary, instead of a deed of revocation; by which her attention would have been called to the terms of the settlement, and the consequence of going farther than to let in the mortgage. [They cited *Broad v. Broad*,† *Clinton v. Hooper*.‡]

Sir Arthur Piggett, Mr. Leach, and Mr. Daniell, for the defendant in the original cause :

[364] * * The settlement of this estate, which the Court is required to strike out of this deed, by turning the person, who has the legal estate, into a trustee for the original uses, commences from and after the expiration or sooner determination of the term; and is not connected with the redemption of the mortgage. Has any case yet occurred, in which, after providing all, that was necessary for the security of the mortgagee, there was an ultimate limitation of new uses to the husband and wife for their lives, and to the heirs of their bodies, and the right heirs of the survivor? What other intention than to resettle the estate can be ascribed to them? That intention was not to be collected in the cases, that have occurred, from a

† 2 Ch. Ca. 98, 161.

‡ 1 R. R. 102 (1 Ves. Jr. 173).

mere reservation of the equity of redemption to the husband and wife and their heirs. * * *

The letters of the defendant, which have been read by the plaintiffs, acknowledging the title of the heir at law of Mrs. Jackson, are considered as inconsistent with the claim, now set up by the defendant; and to that evidence is added his acceptance of a mortgage of that very reversion from the heir; which is considered as decisive. All this admits explanation; and may be attributed to mistake, inadvertence, and surprise. The letters shew complete forgetfulness of all that had passed: the husband, not recollecting that he was tenant for life under the marriage settlement, speaks of himself as heir of his children; meaning his title, as tenant by the curtesy.

INNES
v.
JACKSON.
JACKSON
v.
INNES.
[365]

THE LORD CHANCELLOR†:

The first transaction, upon which the question in this cause arises, is the mortgage in 1745 of the East Knoyle estate; and the deed, creating that mortgage, is drawn at least with great ignorance; as, if the person, who drew that instrument, was apprised of the settlement, it was proper, that the existence of it should be more declared, than it appears to have been, to the person, who was to advance his money. The effect of that transaction is really no more than a demise during the husband's life; though, in order that the mortgagee might have his money secured, this Court would, rather than that the mortgage should not be available, have held it a good execution of the power of revocation, reserved by the settlement. The proviso for redemption, declaring, that if the mortgagor and his wife, or either of them, their or either of their heirs, executors, &c. shall by a certain day pay the sum of 200*l.* and interest, then the term is to cease, does not state, whether there is to be any re-assignment. There is a covenant, that they are the lawful proprietors seised of the absolute and indefeasible estate of inheritance; and a covenant for farther assurance, in terms, amounting to an agreement for levying a fine; just as if it had been so expressed: and, if the mortgagee's title would not have been good without a fine, I apprehend, *an action might have been maintained by him

Dec. 18.

[366]

[*367]

† The judgment is taken from a shorthand writer's note.

INNES
 v.
 JACKSON.
 JACKSON
 v.
 INNES.

upon that covenant: or upon the principle of a certain class of cases perhaps this Court would have decreed the husband to procure his wife to join in levying a fine.

The first point to be considered is, what is the effect of this instrument. I take it to be, as far as it goes, a revocation of the uses of the settlement. I do not think it can be contended, that, as the proviso for repayment of the mortgage-money is by the husband, the result in equity would be more than this; (supposing nothing else to have been done): that all the uses and trusts of the marriage settlement would revive, and take effect as if they had never been displaced; and, unless I am mistaken in the doctrine upon this subject, which, I confess, has been handed down to me by tradition rather than derived from any authorities, that I have been able to trace, I think, it would have made no difference whatsoever, if this had been a proviso, not merely that the term should cease: but that it should be re-assigned to Dr. Jackson.

The doctrine of this Court I take to be, that, if the intention is to make a mortgage of the wife's estate, that intention shall govern the parties; and the equity of redemption shall belong to the person, who had the estate before: so as to give back the inheritance to those, from whom it came: exactly as when a man makes a mortgage of his own estate; and the proviso for redemption is to him and the heirs of his body; falling short of the description of persons, who would have taken the inheritance originally before the mortgage.

[368] This deed having been executed, and the subsequent mortgage in 1746, whether anything further passed with regard to these estates, I know not. With regard to the money property it is clear, that some transaction had taken place, previous to the year 1749. It appears, that at some period, not ascertained, but referred to by an instrument, executed in that year, the power of revocation was exercised as to that property; the trusts of which were revoked: so that it no longer stood upon the trusts, declared for the husband and wife and the children: but, these original trusts being revoked, a new trust had been declared for the husband and wife and the survivor of them: excluding the children in any character; either as purchasers, children, or

issue. The money, having come to the hands of Dr. Jackson, was by him applied in the purchase of copyhold estates; the uses of which were declared to the husband and wife and the survivor of them.

INNES
v.
JACKSON.
JACKSON
v.
INNES.

It was contended, that there must have been an intention in these parties to alter the uses of the East Knoyle estate in the same way. The deed of 1749 certainly professes this; that in that year they did not mean, that the money should go, as they intended it to go in 1748: but in any way of putting it the deed of 1749 does not shew, that they had the same intention of altering the uses of the East Knoyle estate under the settlement of 1746: which professes an intention of altering the former uses; leaving the interest of the children unaffected. The deed of 1749 cuts off the children altogether; operating [as] such an alteration in the uses of the settlement with regard to the money as left the children without any claim, except what they might naturally hope to derive from parental affection: in fact wholly divesting their interest. Besides, though under an instrument, which on the face of it is an execution of a power of revocation *and professes to limit new uses, to the extent, in which new uses are declared by it, they will arise, it does not follow, that new uses will be created in a mortgage transaction: nothing more appearing on the face of it to have been intended than the primary object of borrowing the money.

[*369]

In 1746 the mortgage, on which so much of the argument has turned, was made; and, let the state of facts be raised as high as they will admit, the real question in this cause is, what this Court ought to have decided as between Dr. Jackson and the heir of his wife, if the parties had, when she died, come before the Court with both these instruments. The mortgage deed of 1746 gives Child, the mortgagee, no sort of information as to the marriage settlement; and has not the least reference to it. The indenture of the 25th of November, 1745, is recited in terms; not indeed detailing all the covenants: the deed then recites, that the sum of 200*l.* was not paid according to the proviso for redemption; and that Child's interest had thereby become absolute in law. The payment being to be made on a day certain, the term could not cease under that proviso; but could

INNES
v.
JACKSON.
JACKSON
v.
INNES.

be got rid of only by re-assignment. Dr. Jackson and his wife are then stated to have occasion for the farther sum of 400*l.*; and, to secure those two sums of 200*l.* and 400*l.* they grant, release, ratify, and confirm, to Child, his executors, &c. the premises, in the recited indenture of mortgage granted, for the remainder of the term of one thousand years; subject to a proviso, that if Dr. Jackson and his wife, or either of them, their heirs, executors, &c. shall pay the sum of 600*l.* to Child, his executors, &c. on the 1st of July next, then these presents, and every article, &c. shall cease, determine, and be absolutely void.

[370]

Looking no farther into this deed, this is a good execution of the power, contained in the settlement, as between the mortgagor and the person, who was advancing his money; and although this deed reserved the equity of redemption to the heirs, such reservation would not alter the beneficial interest of the husband or wife. If the husband had the beneficial interest by surviving the wife, or she had the beneficial interest by surviving him, that interest would not have been varied by reserving the equity of redemption to them and their heirs: but, supposing the mortgage to have been paid off, they would have taken the beneficial interest in the same way, as if this mortgage had not been made; and their children's title would have been restored, and maintained in equity.

We come then to the distinction, which has been very ably argued at the bar; to illustrate which let us take the case of a mortgage of the wife's estate; and the contract may assume various forms upon the face of the instrument: yet, if it operates no more, I apprehend, this Court will fix the beneficial interest in the person, who would have had it, if the mortgage had not been made. The mortgagee may under the proviso for redemption be authorized in making the reconveyance to the husband and his heirs; and yet that would not exclude the persons, interested in the inheritance. Where the wife's estate is mortgaged, it is of necessity, that there should be a covenant to levy a fine; and, whether it is levied, or not, the agreement is, generally, evidence of an intention to do something with the estate. If the object is to be collected from the covenant, it is to tenure to the husband and wife and their heirs: but I do not say

that the limitation may not be so expressed as to amount to more of evidence of an intention to effect a change of the beneficial interest, than that the limitation of the wife's estate *should be to the heirs of the wife: and the question must at last come to this; whether, taking the whole transaction together, as connected with this instrument, any thing more was meant than that it should be a mortgage transaction. It appears to me to be no more than a blundering mode of executing a mortgage. The only object of the covenant to levy a fine appears to be to secure the mortgage money; and can a fine, to be levied at the request of a mortgagee, for his security, have the effect of a revocation of the uses of a settlement, and a declaration of new uses; altering the interests of the wife and family in her estate? The question is reduced to this: whether there is apparent on the face of the deed a declaration of intention to do something more than merely to make a mortgage; or that clear manifestation of such intention, which may be represented as equivalent to such a declaration? My opinion is, that there is not; that there is no part of this deed, which shews any purpose beyond that of making a mortgage.

In this view of the case I am strongly impressed with the opinion, that, if the Court had been called upon in 1772 to decide, where the beneficial interest of this property was, the declaration must have been, that it was in the wife, or in the heirs of the wife. I do not think, that any thing has been done since that period, which can make any difference with respect to the question; as it then stood.

INNES
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JACKSON
JACKSON
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INNES.
[*371]

[*Note.*—This decision was reversed on appeal to the House of Lords, with the concurrence of Lord Eldon, L.C. in 1819 (see 1 Bli. 126), on the ground stated in the head note to this report, Lord ELDON observing that the Court below did not rightly apprehend the case. Such reversal, however, in no way impairs the general principle which this case illustrates, nor does it materially detract from the value of the judgment as an exposition of that principle.—O. A. S.]

1810.

Jan. 15.

The MASTER
OF THE
ROLLS for the
LORD CHAN-
CELLOR.

[375]

[*376]

DAY v. MERRY.

(16 Vesey, 375—376.)

Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees, planted for the purpose of excluding objects from view.

A MOTION was made upon the bill of the remainder-man in fee against the tenant for life, without impeachment of waste, to restrain the defendant from *cutting ornamental timber, upon the principle of equitable waste.

Sir Samuel Romilly, in support of the motion, admitting, that it was new, as far as it applied to trees, planted for the purpose of excluding objects from view, contended, that they were within the principle, upon which those injunctions had been granted.

The order was made accordingly.

1810.

Feb. 12.

ELDON, L.C.

[382]

SOMERVILLE v. MACKAY.†

(16 Vesey, 382—389.)

A partner must account for the profits of a business carried on by him in competition with the partnership business and in violation of the partnership agreement. A defendant compelled to make a full discovery on motion, where his answer did not negative the plaintiff's right thereto by a clear positive unequivocal averment.

THE bill in this case represented, that the plaintiff, having been engaged in a partnership for manufacturing muslins and piece goods at Glasgow, which partnership was dissolved in 1794, entered into a treaty with the defendant, who lived in London, for shipping goods, and executing orders to Russia upon their joint account; charging that to be the effect of the letters, that passed between them in March, 1795: and that upon the conclusion of that treaty, it was expressly understood and agreed, that neither of them should send any goods upon their separate accounts to Anderson & Co., or to any other person in Russia. The bill accordingly, upon the foundation of the contract, contained

† *Dean v. MacDowell* (1878) 8 Ch. N. S. 862; *Aas v. Benham*, '91, 2 Ch. D. 345, 47 L. J. Ch. 537, 38 L. T. 244, 65 L. T. 25.

in the letters referred to, prayed, that the plaintiff may be declared entitled to a moiety of the profits of all goods, sent by the plaintiff and the defendant, or by the defendant separately, to Russia, consigned to Anderson & Co. or to any other person : and that an account may be taken accordingly of all goods, sent upon the joint account, or by the defendant upon his private account, to Anderson & Co. or his other agents in Russia ; and of the produce of the sales.

SOMERVILLE
v.
MACKAY.

The defendant put in an answer ; which, admitting, that the letters of the 14th and 15th of March contained the agreement for a partnership, contended, first, that it did not exclude him from trading with Anderson & Co. upon his private account : secondly, if that should be considered the effect of the agreement, that he had afterwards proposed, that he should be at liberty to do so ; to which proposal the plaintiff had consented ; thirdly, that there *was nothing in the terms of the agreement, prohibiting him from carrying on trade upon his private account with any other person in Russia. The defendant insisted, as the effect of the correspondence, which continued down to 1798, that the plaintiff submitted to a dissolution of the partnership ; and it was considered as at an end. He admitted, that he made large consignments to a person, whom he had sent out to Russia ; and made considerable profit thereby ; not derived from the goods, sent upon the joint account ; and the goods, so sent out by him to that agent, were, after the partnership was so considered at an end, sold upon the private and separate account of the defendant ; insisting, that there was no stipulation in the terms, agreed upon for forming the partnership, which prevented that ; and, upon the letters of August and September, 1795, that he had a right to consign any goods or merchandize, except muslins, upon his own account to Anderson & Co. ; that he never did during the partnership send them muslins on his private account, or any goods, before that consent was given ; and that he might during the partnership send muslins or any other goods to any other persons without the plaintiff's consent. He admitted, that the goods, sent to Russia upon his private account, were, notwithstanding a loss upon some articles, upon the whole disposed of at a considerable profit ; and that he

[*383]

SOMERVILLE received several remittances in bills and money from Anderson & Co. on that account.
 v.
 MACKAY.

Exceptions to this answer being allowed, a farther answer was put in; admitting, that the defendant had in his possession several books and papers, relating to the goods, sent to him by Anderson & Co. and other persons in Russia on his separate account; but submitting, that he ought not to be compelled to produce them. Exceptions being again allowed, the defendant,
 [*384] by a third *answer, again submitting, that for the reasons, before stated, he ought not to be compelled to give a particular account, relating to the separate trade, &c. set forth by a schedule, a list of books, containing all the letters, relating to it.

A motion, that the defendant may be ordered within a fortnight to produce for the inspection of the plaintiff the several books, &c. mentioned and referred to in the schedule to the second farther answer, supported by *Sir Samuel Romilly* and *Mr. Cooke*, and opposed by *Sir Arthur Piggott*, stood for judgment.

THE LORD CHANCELLOR :

It is insisted for the defendant, that, as to some of the books and papers, the inspection of which is the object of this motion, though a demurrer, or a plea, has not been put in, the defendant is not bound to make any discovery as to that, which he calls his separate and private trade; and one view of this case, as represented by the bill, is, that, if this is really to be considered as the separate trade of the defendant, he by art, contrivance, and misrepresentation, induced the plaintiff to withdraw from that, which is represented as the joint trade; and the production of the papers required would manifest, that, when the defendant represented the Russia trade to be a losing concern, he was carrying it on himself with great advantage; and in this view the production is important. The bill however has by no means charge enough to justify the production upon that ground; and the only ground, upon which it can be obtained, is, that, upon the whole case, taken altogether, the defendant cannot refuse the farther discovery; considering what he has in fact answered.

[385] The allegation is no more than a charge of what is contended to be the effect of the letters themselves; that upon the conclu-

sion of the treaty for the joint concern it was expressly understood and agreed, that neither of them should send any goods upon their separate accounts to Russia; consigned to Anderson & Co. or to any other person; that the whole was to be joint; that this was a part of the terms of the partnership: the basis of it; as appears by the letter of March, 1798. As to one of the points, made by the defendant, if this agreement, according to its true import, as it appears upon the bill, does not prohibit the defendant from trading separately with Anderson & Co., or with any other person, the proper course for the defendant seems to be a demurrer, as to any account of the private trade: the plaintiff having no title to discovery or relief upon that head; if not prohibited by the agreement. The defendant, not taking that course, has made this defence by these three answers.

SOMERVILLE
v.
MAOKAY.

It is necessary to advert to the particulars of this correspondence, to see, whether it bears out the assertion, that the defendant had the plaintiff's leave to trade generally with Anderson & Co. to any extent, upon his separate account: not merely in a particular adventure. A proposition of the plaintiff to wind up and put an end to the concern certainly appears: but the defendant must shew, that it was wound up, and determined. He states a letter, on the 31st of August, 1795, opening a proposal to the plaintiff, to which he expresses a strong inclination to accede, for liberty to the defendant to trade separately with Anderson & Co. except in the article of muslins: but that does not appear to have been matured into agreement. The letter of the 17th of August, 1796, upon which the defendant contends, that the plaintiff submitted to a dissolution of the partnership on such *terms as the defendant should think proper, not having produced any answer, or communication of terms, cannot have the effect of dissolving the partnership. The defendant's conclusion from his letter of the 16th of January, 1797, and that of the plaintiff of the 24th of January, is, that the partnership was considered as at an end: but a positive averment, that it was at an end, is necessary: the correspondence leaving that fact, and by whom it was determined, extremely doubtful; and the conclusions of the parties may have been different.

[*386]

The letter of September, 1795, upon which the defendant

SOMERVILLE
v.
MACKAY.

relies, expresses no more than that in the meantime he may, if agreeable, make up a parcel of any articles, except muslins : certainly not importing a general permission to trade in any articles, either with Anderson & Co. or with any other person. So in the letter of the 24th of August preceding, the plaintiff says, he approves of his sending out a few boxes ; not doubting they will be all Lancashire goods. It is extremely difficult to maintain upon the whole correspondence, that a general permission is given to trade with Anderson & Co. generally, for all articles, and to all time. These letters are also material, as written evidence, that the defendant did not conceive himself to be at liberty to carry on a private, separate, trade with Anderson & Co. the letter of the 13th of August clearly shews, that the partnership was not then dissolved : but the fair construction is, that it applies to a concern, not in progress, but not finally wound up.

[*387]

The answer contends, that upon the true meaning of the agreement, contained in these letters, there is nothing, that prohibits the defendant from sending articles of any description to any person, except Anderson & Co. ; and, insisting also upon the special permission to *send any goods, except muslins to Anderson & Co., submits, that the plaintiff is not entitled to the accounts prayed ; and that the defendant is not to be compelled to set forth such accounts ; or to produce any books, &c. ; denying, that any thing is due from him in respect of the profits ; in case any profits were made by the goods, so sent by him ; having before admitted, that profits were made.

The effect of the answer is this. The defendant discovers, that he did carry on a separate trade ; that he derived considerable profit from it ; and has books, relating to it ; but insists, that he is not liable to be called on to state, what books he has. This is, not a demurrer, as far as the bill seeks an account of these facts, but an answer ; making a partial discovery ; and refusing the rest ; and it recalls to my mind the inconvenience, which struck me forcibly in some former cases. The old rule, before the time of Lord Thurlow was either to demur ; to plead, upon something *dehors* the bill, or that sort of negative plea, of which we know more in equity than at law ; or to answer

throughout. The inconvenience of this new mode of pleading is, that the defence is not judged of by the Court in the first instance: but it goes first to the Master, upon exceptions to the answer: then to the Court upon exceptions to the report: assuming in this instance a different shape, a motion for the production of books and papers; in substance the same; as that production can only be required upon the same principle: the whole process being gone through, under which formerly the defendant was understood as admitting, that *he had no such short answer to state, as would entitle him to a declaration in the first instance, whether he ought not to make any farther answer; which might leave an equity, to be decided upon at the hearing.

SOMERVILLE
v.
MACKAY.

[*388]

The course this has taken is, that exceptions to the answer were allowed; and a farther answer was put in; with an admission, that there are in his possession several books and papers, relating to the goods, so sent to Anderson & Co. and to other persons in Russia, upon his separate and private account; submitting however, that he ought not to be compelled to produce them; insisting therefore by the second answer, not in the form of a plea or demurrer, that the plaintiff is not entitled to the discovery; which however is partially given. Exceptions were again taken; and the Master's opinion being, that the second answer was also insufficient, a third answer was put in; by which the defendant, submitting, that for the reasons, and under the circumstances, before stated, he ought not to be compelled to give a particular account, relating to the trade, carried on by him separately, has however set forth in a schedule a list of books, in which are contained all the letters, &c. relating to that separate trade.

The short result is therefore this. The plaintiff, stating a partnership, formed upon certain terms, contained in a written correspondence, contends, that the meaning of the parties was, that no trade should be carried on with Russia except on the joint account; alleging, that the defendant did, in fraud of that agreement, and concealing the fact, carry on a separate trade, not only with Anderson & Co. but originally, contrary to the agreement, with other persons; insisting, that this conduct of

SOMERVILLE
v.
MACKAY.

[*389]

the defendant was in both its branches a direct violation of the agreement ; giving the plaintiff a right to a moiety of the profits. The course, taken by the defendant, is not to demur or plead, but to state by answer, that, according *to the true construction of the letters, containing the terms of the agreement, he had full liberty to carry on this separate trade ; that afterwards, not choosing to rest upon that any longer, he carried it on with the leave of the plaintiff ; and that is not a mere general assertion ; but it is made with reference to the letters. The defendant says, that he will, though the plaintiff is not entitled to the discovery, state that the defendant, having that licence, did trade at a considerable profit ; that he kept books and accounts : referring to, and setting forth by a schedule, the books, which he has ; yet by the same answer refusing to permit the plaintiff to look at them.

As to the conclusion of fact, it is by no means clear, that the defendant had any right to trade with other persons : but upon the letters, considered as an agreement, the far better opinion is, that he had no right to trade separately with Anderson & Co. If the answer had contained a clear, positive, unequivocal, averment of the plaintiff's acquiescence and permission, the question, whether the defendant was bound to make the discovery as to the fruit of it, would fairly arise : but the utmost amount of what appears is a special consent to send a small quantity ; which can never be represented as a general acquiescence in an unlimited trade, contrary to the general obligation.

The result is, that here is not averment positive enough of the ground, upon which the defendant can refuse to answer ; that the manner, in which he states his objection, makes it impossible for the Court to decide, that he shall give no farther or other answer, according to the language of pleading ; and upon the whole, as he has put his defence upon the record, he cannot refuse a production of the books, contained in the schedule.

SEAMAN *v.* VAWDREY.†

(16 Vesey, 390—393.)

1810.

Feb. 16, 19.

Reservation of salt works, mines, &c. in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation, upon the usual covenants, held an objection, giving a right to compensation: the purchaser not insisting upon it farther.

Rolls Court.
GRANT, M.R.
[390]

The inference of abandonment of a right from non-user not applicable to the case of mines.

THE bill prayed the specific performance of a contract by the defendant to purchase estates in the county of Chester. An objection was taken to the title upon the ground, that by indentures of lease and release, dated the 26th and 27th of September, 1704, Cicely Croxton conveyed to Peter Yate, his heirs and assigns, the manor and estate of Ravenscroft, subject to the following reservation: except and always reserved to the said Cicely Croxton and her heirs the Wych houses, salt works, and brine pits, in Ravenscroft, and a piece of land, adjoining thereto, parcel of the meadow, wherein the same salt works stood (describing it); and also all springs, veins, and mines, of brine salt or salt rock in another small parcel of the said meadow; with full liberty, without paying anything, for Cicely Croxton and her heirs, &c. without the let, &c. of Yate, his heirs or assigns, to sink and make any new brine pits, salt pits, &c.; and to have free ingress, &c. to take, and carry away, and do all things necessary.

By the conveyance of 1761 to John Seaman, under whose devise the plaintiff was entitled, no notice was taken of the reservation in the deed of 1704.

The answer insisted, that under the said reservation there was in the heirs of Cicely Croxton a right to all the springs, mines, &c. in the land devised; and a right of entry, &c. in respect of which the plaintiff is entitled to compensation. That question was therefore brought on, by consent, without an exception: the defendant not making it an objection to the title.

† *Low Moor Co. v. Stanley Coal Co.* (1875) 33 L. T. N. S. 436, 441, 445.

SEAMAN
v.
VAWDREY.

[391]

Mr. Richards and *Mr. Roupell*, for the plaintiff, relied on the case of *Lyddal v. Weston* ; † contending, that the salt works, existing upon this estate in the year 1704, having been levelled, and from that time no act by or under the title of *Mrs. Croxton* appearing, a strong presumption arose, that she had released, or, in some way abandoned, her right under the reservation in that conveyance : especially as the title was taken in 1761 by a purchaser, with the usual covenants, without the exception : showing a clear conviction at that time, that there was no right under that reservation.

Sir Samuel Romilly and *Mr. Wetherell*, for the defendant :

The non-user of this right proves nothing : the object of such a reservation being, that the party may have the power of exercising the right, when his circumstances may enable him to meet the expense, attending such an undertaking. What time can bar such a private right ? It is not like a right of way. The ground of presumption in all cases is, that the person, seeking to establish the right, has done some act inconsistent with it : but the possession in this instance was not inconsistent with the right claimed : as in the case of a right of way.

Feb. 19. THE MASTER OF THE ROLLS :

[*392]

The deed of 1704 contains an express and unequivocal reservation of all mines and veins of salt, that might be contained in the estate of *Ravenscroft*. It was for the purchaser to consider, how far it was prudent to take an estate, subject to such a lien ; but in fact by the terms of the agreement *Mrs. Croxton* became as much the *owner of the mines, as *Mr. Yate* became owner of the soil. The question is, how those, who may now represent her, have lost this property, or their right to enter upon the enjoyment of it. Not by any actual grant or release ; for none is alleged : but it is said, at this distance of time a release is to be presumed. I do not clearly see any circumstances, from which that presumption is to arise. No adverse possession is alleged. The owner of the soil has had the enjoyment, to which

† 2 Atk. 19.

he was entitled by the contract; and which is perfectly consistent with the right of the owner of the mines. If it could be shewn, that he had wrought any mines himself, or had interrupted the other parties, claiming as representing Mrs. Croxton, under the reservation of the mines, in working them, that would lay a ground, upon which the presumption could stand: but nothing is alleged, except the mere absence of any evidence of the exercise of this reserved right; for I do not see, how the circumstance, that in the conveyance of 1761 no notice is taken of this reservation, can weigh against the persons, who represent Mrs. Croxton, if they should think proper to assert her right. There are many cases, where from non-user of a right the inference of abandonment may fairly be made: but that does not apply to such a case as this. It is not so generally true, that the owner of mines does work every mine, which he has a right to work; and therefore the relinquishment of the right cannot be presumed from the non-exercise of it. It is well known, that mines remain unwrought for generations; that they are frequently purchased, or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought, until other mines shall be exhausted; which may not be for a long period of time. It is impossible therefore to infer, that this right is extinguished; though there is no evidence of the exercise of it since the year 1704.

SEAMAN
v.
VAWDREY.

The case of *Lyddal v. Weston*,† instead of being an authority for the defendant, appears to me to afford an argument by implication against him. The grounds, upon which Lord HARDWICKE's judgment goes, are two: first, that upon examination the probability was great, that there were no such mines: secondly, that the Crown, having merely reserved the mines, without any right of entry, could not grant a licence to enter upon another man's estate for the purpose of working them. That position is liable to considerable doubt: as being inconsistent with the resolutions of the Judges in the case of mines in Plowden.‡ Lord HARDWICKE however thought it necessary to assume it, before he could determine against the validity of the purchaser's objection. Here, first, it is not alleged, that there is

[393]

† 2 Atk. 19.

‡ Plowd. 310. See 336.

SEAMAN
v.
VAWDREY.

no probability of mines upon this estate: it is rather admitted, that there were: secondly, here is the reservation of a right of entry; upon the want of which Lord HARDWICKE laid stress in that case. The defendant chooses to consider this, not as an objection to the title, but as a ground for compensation; and I think, he is entitled to such compensation.

1808.
Nov. 8.

SHIRT v. WESTBY.†

(16 Vesey, 393—396.)

ELDON, L.C.
[393]

A charge by will on real estate of simple contract debts of another person considered as a legacy, carrying interest from the death of the testator at 4 per cent.

[*394] JOHN HIRST by his will, dated the 20th of June, 1795, directed, that all his just debts and funeral expenses be paid and discharged by his executor out of *his personal estate; and, in case that should prove deficient, he thereby charged and subjected his real estate to come in aid of and supply such deficiency. Then having charged his real estate with the payment of some annuities he gave and devised all his real estate to his eldest son John Hirst, his heirs and assigns; and also gave him all his personal estate; and appointed him sole executor.

John Hirst the younger, having survived his father, by his will, dated the 11th of October, 1802, directed the payment of his debts in the following manner:—

“First, I will that all my just debts and funeral expenses be paid satisfied and discharged by my executrix hereinafter named out of my personal estate and in case that shall prove deficient I hereby charge and make subject my real estate to come in aid of and supply such deficiency.”

The testator then, charging his real estates in the county of York with the payment of some annuities, devised all his estates so charged, and all other his estates in the said county or elsewhere in Great Britain, to his sister Catherine Westby for life, with several remainders over to other persons in strict settle-

† *Turner v. Buck* (1874) L. R. 18 *Waters* (1889) 42 Ch. D. 517, 58 L. J. Eq. 301, 43 L. J. Ch. 583; *In re* Ch. 750, 61 L. T. 431.

ment, subject to a trust term for raising 6,000*l.*; which he disposed of by his will; and proceeded thus:—

SHIRT
v.
WESTBY.

“And I do hereby charge and make subject and liable my real estates situate within the township of Kimberworth to and with the payment of the following sums of money or such of them as shall be unpaid and undischarged at the time of my decease and which are the debts of my late brother James Hirst deceased: to Sarah Jackson of Wath upon Lerne in the said *county the sum of 300*l.*”; specifying the other persons and sums in the same manner; and he appointed his sister Catherine Westby his sole executrix.

[*395]

The testator died in the year 1804. The bill was filed by creditors of John Hirst the elder, and of James Hirst, on behalf of themselves and all the other creditors; and, the cause coming on for farther directions upon the Master's report, under a decree, directing the necessary accounts, the question was, whether the debts of James Hirst, remaining undischarged, at the decease of John Hirst the younger, which were ascertained by the report at the sum of 1,259*l.* 19*s.* 6*d.* should bear interest under the charge in his will for payment of them. That question was expressly reserved by the decree.

Sir Samuel Romilly and *Mr. Heald*, for the plaintiffs, contended, that these debts, directed to be paid by a person, not under any obligation to pay them, were to be considered as legacies; and, being charged upon a fund, producing an annual income, ought to carry interest.

Mr. Richards, *Mr. Alexander*, *Mr. Hall*, and *Mr. Heys*, for the defendants, insisted, that this is a mere question of intention; whether the testator has made a voluntary gift; or meant to put himself in the place of his brother; merely doing an act of justice by paying his brother's debts; as he, if living and solvent, would have done. A devise to pay the debt of another, cannot be considered as a legacy: a debt can carry interest only by the nature of the contract, express or implied, or by the rule of the Court; and this claim fails upon either ground.

[It is unnecessary to refer to the old cases cited by counsel as to interest on legacies.]

SHIRT
^{c.}
 WESTBY.
 [396]

The LORD CHANCELLOR said, the question was, whether these particular sums are not to be considered as legacies, bequeathed by this testator ; and as such to carry interest. He certainly did not regard them as his debts : nor did he mean, that interest should be paid before his death. It is clearly bounty : to be considered as a legacy, charged on real estate ; and carrying interest ; not as the debts of James Hirst ; but as sums of money, bequeathed by John Hirst the younger. As they are charged upon real estate only, the interest must be computed from the death of the testator, at 4 per cent.† * * *

1810.
 March 5, 6.
 Rolls Court.
 GRANT, M.R.
 [413]

WALL v. TOMLINSON.

(16 Vesey, 413—416.)

Residuary bequest to A. "in case she should have legitimate children ; in failure of which" to go over.

A. having only one child born alive, who died before her, entitled absolutely.

Stock, the property of a married woman, not reduced into possession, so as to be vested in her husband, by a transfer to him merely as a trustee.

[*414]

PHILIP DELAFIELD by his will, after giving some legacies, and some specific legacies to Lord Say and Sele, to his son Thomas Twisleton all his effects *in India, annuities of 20*l.* for life to his niece Mary Delafield and his sister Jane Broad, and to Harriet Wittle Strangeway a like annuity of 20*l.* for life, gave the interest of the residue of his property to his wife Mary Delafield for life ; and after her death he gave the principal of his property to her children, if she had any by him : but if she had no children then to the said Harriet Wittle Strangeway for ever in case she should have legitimate children : in failure of which the whole to Lord Say and Sele's daughters Julia and Cassandra Twisleton ; and he directed that part of his fortune, which was then in England, to remain where it then was in the funds till Mrs. Delafield's death.

The testator died in 1783. His widow, who was the surviving executrix, died in 1802 ; never having had any children.

† See *Spurway v. Glynn*, 7 R. R. son, 9 R. R. 1 (1 Sch. & Lef. 10.) 279 (9 Ves. 483) ; *Pearson v. Pear-*

Harriet Wittle Strangeway married William Cowles; and after their deaths the bill was filed by the executors of William Cowles and the administrators with the will annexed of his widow; claiming the residue.

WALL
v.
TOMLINSON.

The Master's report stated, that Mr. and Mrs. Cowles were married in March, 1802; that Mrs. Cowles was delivered of a still-born child in April, 1803: in March, 1804, she had a male child; who died in April, 1805; and was the only child of the marriage born alive. William Cowles died in March, 1804; and his widow died in 1805, after the death of the child.

The defendants, the daughters of Lord Say and Sele, with their husbands, claimed under the limitation over.

The report farther stated, that after the death of the testator's widow administration *de bonis non*, with the will annexed, was granted to Mrs. Cowles; of the personal estate of the testator; and a similar administration *to his widow, as to 1,000*l.* East India Stock, of which she had after his death obtained a transfer, was also granted to Mrs. Cowles; and it was agreed, that William Cowles should have a transfer of part of the testator's property, consisting of Short Annuities, of the value of 1,500*l.* to himself; and that the East India Stock, of the value of 2,000*l.*, should be transferred to trustees, in trust, first, for payment of the annuities, and, subject thereto, for the separate use of Mrs. Cowles, and in the event of her husband's surviving her to pay the dividends to him for life, and after the death of the survivor to divide the principal among the children according to the appointment of Mrs. Cowles; in default of appointment equally; and, if there should be no children, to the survivor of the husband and wife absolutely; and it was farther agreed, that the stock should be transferred into the joint names of William Cowles, the husband, and the defendant Tomlinson, until trustees should be named; and the stock was transferred accordingly: but the agreement was never reduced to writing.

[*415]

The questions were, first, upon the claim of Mrs. Leigh and Mrs. Graves, the daughters of Lord Say and Sele, under the limitation over: secondly, between the plaintiffs, as executors of William Cowles, claiming the East India Stock, as having been reduced into possession by the transfer to him with Tomlinson,

WALL
v.
TOMLINSON.

and legatees of his widow, claiming under the last limitation of the trust, upon which that transfer was made; as she had survived her husband.

Mr. Leach and *Mr. Owen*, for the plaintiffs. *Sir Samuel Romilly*, *Mr. Heys*, *Mr. Martin*, and *Mr. Wetherell*, for the defendants.

March 6. THE MASTER OF THE ROLLS:

[416]

The testator's object appears to have been in the event of Mrs. Cowles having children to give her the means of making a provision for them. It cannot be contended, that from the event of her having only one child there is to be a different construction; so that in that case the child was to be left without a provision. As to the words "in failure of which" it is very difficult in this case to give those words the construction of not leaving children at her death; which would tie it up during her whole life. The testator does not seem to have contemplated the event, which has happened, of the death of the children in the life-time of the mother.

Upon the other question the transfer of the East India Stock to the husband, merely as a trustee, cannot be represented as a reduction into possession, that will entitle his representatives. It was made *diverso intuitu*.

1810.

April 2, 3.

ELDON, L.C.

[454]

COLLINS v. PLUMB.

(16 Vesey, 454—461.)

Covenant upon a conveyance in fee with the grantors, lessees of water-works, not to sell or dispose of water from a well to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns.

The parties left to law, and a demurrer allowed from the inconvenience of enforcing such a covenant by injunction.

THE bill stated, that the Bishop of Winchester, for the time being, is lord of the manor of Alverstoke and Gosport; and in 1695 the then bishop granted a lease for lives to Thomas Lewis, of a piece of waste ground and pond, and springs running there-

in, at Forton, near Gosport; in order to erect water-works; with liberty to lay pipes through any of the lanes, streets, highways, commons and waste grounds, leading from thence to and through Forton and Gosport, &c.; and to erect cisterns and other conveniences upon the beach for the better and more effectually supplying the inhabitants of Gosport, and his Majesty's navy and other ships, with fresh water; and that in the said lease there was a covenant on the part of the bishop and his successors, for a perpetual renewal thereof.

COLLINS
v.
PLUMB.

The bill farther stated, that Lewis afterwards built water-works upon the said waste; and erected cisterns and other conveniences upon the beach of Gosport, for the better and more effectually supplying the inhabitants of Gosport, and his Majesty's navy, and other ships, with fresh water; and laid out 2,000*l.*; and the works at length became vested in Charles Childe; who was also seised of a freehold messuage, and premises, and a well in front of the same; and he devised the water-works with his freehold premises, (including the said well,) to trustees, in trust to sell; who accordingly by indentures of lease and release, dated the 23rd and 24th of July, 1792, conveyed to the use of George M'Kinley, and his heirs, the freehold premises with the well; and *in the said indenture of release was contained a covenant, whereby M'Kinley, for himself, his heirs and assigns, covenanted with the devisees in trust of the water-works not to sell or dispose of the water from the said well to any persons or person whomsoever, to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns.

[*455]

By indentures of lease and release, dated the 2nd and 3rd of March, 1797, M'Kinley conveyed to the use of William Hollis; who devised the premises with the well to his daughter, her heirs and assigns; and by several conveyances the said premises and well became in 1807 vested in the defendant, as owner; and he now occupies the same; and the title-deeds, relating thereto, amongst which is the indenture of 1792, are in his custody or power.

The bill farther stated, that by indentures of lease and release, dated the 2nd and 3rd of April, 1794, the water-works were

COLLINS conveyed by the devisees in trust of Charles Childe, to the use
PLUMB. of the plaintiff Collins, and his heirs, in trust for the other plaintiffs, their heirs and assigns.

By indentures of lease, dated the 8th of June, 1807, the Bishop of Winchester granted to Collins a new lease of the water-works at Forton, near Gosport, for the purpose of supplying the inhabitants of Gosport, &c. with fresh water; to hold to Collins, his heirs and assigns, for lives; and Collins declared himself a trustee for the other plaintiffs.

[*456] The bill then stated, that, before the plaintiffs entered into possession of the water-works, pipes had been laid *for conveying water into cisterns in houses in Gosport; and large cisterns had been made in the town for conveying water to houses, which had no private cisterns, at the expense of the proprietors of the water-works; and the plaintiffs expended considerable sums in repairing and improving the said water-works for the convenience of the town of Gosport, and his Majesty's ships, and other vessels, in order to furnish them with a constant supply of fresh water; and that the said water-works are sufficient for that purpose; and the plaintiffs have supplied the inhabitants of Gosport, and his Majesty's navy, and other ships and vessels, with water; and have exercised and enjoyed the same privileges, advantages, and emoluments, from the water-works, as Childe, and his predecessors, proprietors of the same, exercised and enjoyed, until they were interrupted by the defendant: that in 1807, and soon after the defendant became seised of the said premises and well, he by means of water-carts and horses, has supplied divers inhabitants of Gosport with water from the well; and has sold and disposed of water from the said well to the great prejudice and injury of the plaintiffs, who are proprietors of the water-works, and in violation of the covenant in the indenture of 1792.

The bill therefore, charging, that the defendant has no right to sell or dispose of the water of the said well to the injury of the proprietors of the water-works, and that he is not a purchaser of the said premises and well for valuable consideration without notice of the said covenant, prayed an account of the profits, made by the sale of water from the well; and an injunction,

restraining the defendant from selling and disposing of the water of the well to the inhabitants of Gosport, and to his Majesty's ships and vessels, and other ships and vessels, and in any manner, to the prejudice and injury *of the plaintiffs, as the proprietors of the said water-works.

COLLINS
v.
PLUMB.

[*457]

To this bill the defendant put in a general demurrer.

Mr. Leach and *Mr. Phillimore*, in support of the demurrer.

* * *

Sir Samuel Romilly and *Mr. Hart*, for the plaintiffs.

[458]

[Having regard to the ground upon which the judgment proceeds it becomes unnecessary to refer to the arguments of counsel which turned upon other points.]

THE LORD CHANCELLOR :

[459]

This Court will interfere in many cases to restrain a breach of covenant : but I never met with such a covenant as this ; upon which I must try in each instance, whether the act of selling the specified quantity of water is a prejudice to the proprietors of these water-works. I cannot imagine, what jurisdiction a court of equity can have upon such a covenant.

THE LORD CHANCELLOR [after stating the different objections raised by the defendant said :]

1810.
April 3.

This is a covenant, not against selling the water of this well, but against selling it to the injury of the proprietors of these water-works ; and, those words being infused into the covenant, the plaintiffs at law must prove, not only, that the covenant is broken, but that it is broken in a sense, that can be represented as injurious. Many cases may be supposed, in which the water might be sold without any injury to them ; and it is accordingly contended, that the injunction, which is the object, ought to go, not to prevent their selling water to the inhabitants of Gosport and Portsmouth, or the navy, but to prevent their doing so to the injury of the plaintiffs' water-works. Observe the situation of the defendant. Upon every application to commit for breach of the injunction, the only mode of giving effect to the decree,

[460]

COLLINS
v.
PLUMB.
[*461]

a trial *must in each instance be directed, to ascertain, whether that act, which might be done without injury to the plaintiffs, has been done without injury : suppose two ships, touching at Portsmouth, in want of water : the one going to Sheerness : the other to the West Indies : the latter must pay, whatever might be the demand : the other would take no more than was necessary ; and if in that instance two or three casks were sold, could that be represented as a prejudice to the plaintiffs ; to whom they might not have resorted, if the defendant had refused the supply ?

In a case of so great inconvenience, therefore, the plaintiffs not being able to enforce the injunction, the only real object, without a trial upon every act, and not having thought proper to reserve this well, but resting upon this covenant, there is the covenant ; and they must make what they can of it.

The demurrer was allowed.

1809.

Dec. 13.

Rolls Court.

GRANT, M.R.

[512]

PEACOCK v. EVANS.†

EVANS v. PEACOCK.

(16 Vesey, 512—518.)

In equity an expectant heir, dealing for his expectancy, is entitled to nearly as much protection as a person under an incapacity to contract.

The relief on payment of principal, interest, and costs ; the purchaser being considered as a mortgagee. His bill, to establish the purchase, dismissed with costs, except of depositions, used by the other party.

THE object of the bill in the first of these causes was to obtain a decree for a conveyance of estates according to articles of agreement, dated the 1st of March, 1801, for the sale of the equity of redemption and reversion to the plaintiff ; and a deed of appointment and confirmation under a power. The bill in the second cause prayed, that upon payment by the plaintiff in that cause, to the defendant, who was plaintiff in the other, of the sums, really paid by him, with interest, the defendant Peacock

† *Nevill v. Snelling* (1880) 15 Ch. D. 679, 49 L. J. Ch. 777, 43 L. T. 244.

may be decreed to deliver up the agreement and indentures to be cancelled.

By the articles of agreement William Evans in consideration of 500*l.*, to be paid to him by Peacock, pursuant to the covenant hereinafter contained, agreed, that he William Evans, and his heirs, would within one month after the decease of Charles Evans, the father of William, convey to Peacock, and his heirs, several estates in the county of Anglesea; and Peacock agreed, that he, his *heirs, executors, &c. would upon making such conveyance at the time aforesaid pay to William Evans, his heirs or assigns, the said sum of 500*l.* for the absolute purchase and reversion of the said hereby bargained premises by instalments, as follows: the first instalment of 50*l.*, on the day of executing this indenture, and every three months after 50*l.*; and Evans agreed to pay 1,000*l.* with interest, should he not fulfil the agreement; and farther to pay all expenses, that Peacock should be put to in trying to recover possession of the said tenements, “which I have this day absolutely sold to the said William Peacock for thirty years purchase, allowing five years purchase to be deducted for my father’s life interest in them.”

The circumstances, alleged by the bill in the second cause, which was filed after the death of William Evans by his brother and heir at law Charles Evans, were, that William Evans was addicted to drinking, extravagant, improvident, and necessitous; being much in debt; and having no property, except a small allowance from his father: whose father in 1801 was of the age of seventy-five, and in a declining state of health; that Peacock, knowing these circumstances, applied to William Evans, and prevailed upon him to sell; that the articles were prepared by Peacock, or his attorney; that he inserted the premises, called Harvey’s Quillets: Evans not at that time knowing, that they did not belong to Harvey; who was entitled only to a quit-rent out of them; with which Peacock was acquainted; that the articles were not perused by any attorney on behalf of Evans; that the estates were of much greater value than 500*l.*; and the rents were not the full annual value; and the father’s life not worth more than two years purchase.

Charles Evans, the father, died on the 15th of September,

PEACOCK
v.
EVANS.
EVANS
v.
PEACOCK.

[*513]

PEACOCK
v.
EVANS.
EVANS
v.
PEACOCK.
[*514]

*1802. Upon his death William Evans entered ; and continued in possession until his death in 1803. The defendant Peacock by his answer and in his bill denied all fraud ; and represented, that the application to sell came from Evans ; that the consideration was fair, &c.

Mr. Richards, Sir Samuel Romilly, and Mr. Trower, for the plaintiff in the original cause. *Mr. Alexander, and Mr. Wyatt*, for the defendant.

1809.
Dec. 13.

THE MASTER OF THE ROLLS :

No difficulty could have arisen upon this case, if it had not been that of an expectant heir, dealing for his expectancy during his father's life. To that class of persons this Court seems to have extended a degree of protection, approaching nearly to an incapacity to bind themselves by any contract.

In *Gwynne v. Heaton* † Lord THURLOW says, “there is a policy in justice, protecting the person, who has the expectancy ; and reducing him to the situation of an infant against the effects of his own conduct ;” and in *Coles v. Trecothick*,‡ where inadequacy was not in question, the present LORD CHANCELLOR says, “the cases of reversions, and interests of that sort, go upon a very different principle. In some the whole duty of making good the bargain upon the principles of this Court is upon the vendee ; as in the instance of heirs expectant.”

[*515] The tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, *seems not to have been considered as operating to prevent its adoption and establishment ; but, on the contrary, some Judges have avowed that probable consequence as being to them the recommendation of the doctrine.

In this case, though I think there is nothing approaching to fraud or imposition, yet it will not bear the test of that severe scrutiny, to which it must upon these principles be brought ; as upon the whole of the evidence it is clear, that Mr. Peacock has obtained a very advantageous bargain. The consequence is, that he cannot retain it, against this person ; though it was un-

† 1 Br. C. C. 1 ; see page 9.

‡ 7 R. R. 167, 175 (9 Ves. 234, 246).

doubtedly lawful for him to take the advantage, as against any one, who had been in the consideration of this Court upon an equal footing with him. I must take it for granted, that the offer was originally made by William Evans; that this was a bargain, not in the first instance of Peacock's seeking, but, when he had the caution to abstain from making an agreement with Evans at his own house, in February, in the absence of any witness, it was a great imprudence in him the next day, in the presence of a witness, who could not be of any use, himself to draw the agreement. It is quite evident, that the parties were incompetent to the task they undertook. They did not understand the subject. They seem to have supposed, that Evans could not convey his remainder in fee, subject to his father's life; and also, that, if Evans should die in his father's life, there would be an end of the agreement; and the estate could not be conveyed. At the end of the agreement there is an anxious provision, that at all events it shall be executed in six months under a penalty; and Evans is made to agree, that he shall be at the expense of insuring his own life against his father's; in order to guard against this supposed risk, which Peacock would run. They gave the agreement to an attorney; who when *he came two days afterwards to carry it into execution, drew a deed, containing an immediate conveyance of the remainder. Who can tell, what effect that supposed risk may have had in determining the price? for it is not exactly the same thing to run no risk, and to be able to secure yourself against a risk by an insurance; which I suppose would only have returned to Peacock his 500*l.*: but what he wanted was the estate.

PEACOCK
v.
EVANS.
EVANS
r.
PEACOCK.

[*516]

Another circumstance, appearing upon the face of the agreement, is, that Evans intended to have, and Peacock consented to give, thirty years purchase; abating the father's life-interest; valued at five years purchase. That abatement being made, it was just the same as if the father had been dead; and the amount of twenty-five years purchase ought to have been immediately paid down. Instead of that the payment was to be made by instalments: the last at the distance of two years and a quarter. This is material, first, with reference to the accommodation, which was the object of Evans: secondly, in point of

PEACOCK
v.
EVANS.
EVANS
v.
PEACOCK.

interest: this distressed man was obliged immediately to raise money upon the bond; when according to the true spirit of the agreement he ought to have had the money in his possession immediately upon the execution of the conveyance.

[*517]

The material consideration however is the great undervalue. It is true, the agreement is for thirty years purchase of the then rents: but there was no previous inquiry as to the present value: how long those rents had been payable: whether they had been lately raised; or were old rents. Without any inquiry of that sort the purchase was settled immediately upon the rental: Evans recently released from gaol: Peacock, being the owner of the adjoining estate, had an opportunity of knowing the value of the land: the parties so far not precisely upon *a footing: no witness brought forward, who says, that the price given was in his opinion the fair value. Peacock's witnesses make it 668*l.* for twenty-five, or rather twenty-three, years, purchase; for they estimate the father's life at seven years purchase: upon what date I do not know; as it was not the agreement, that it should be so estimated; and no value was set upon what is called Harvey's Quillets. If that addition was made, the price ought to have been something more than 700*l.*: a considerable difference upon so small a price as 500*l.* Upon the other side six or seven witnesses swear to a valuation, that would bring the estate to 2,040*l.* It is observed upon this evidence, that five or six different surveyors and farmers all agree to a shilling in their estimate; which at first sight does diminish the credit of their testimony: but upon inspecting the evidence, though some of them take no notice, that they valued in company with the others, two witnesses state it to be a joint valuation. It is therefore nothing more than that, making the valuation together, they came to a joint conclusion, that that sum of 68*l.* was the fair rental. It is true, that valuation was made three or four years after the purchase: but all the tenants say, there were no improvements of any kind in the interval: but the estate was rather grown worse in that period. Suppose a medium struck: that would bring it to 1,200*l.*: but under the particular circumstances of this purchase, even upon the valuation of Peacock's surveyors, I must have set it aside; the inadequacy still being

considerable ; and, though inadequacy of consideration between persons, who stand upon a precisely equal footing, is in this Court of no account, unless from its grossness it is of itself evidence of fraud, yet under the circumstances, in which Evans stood, any thing, that can be substantially considered as inadequacy, is a ground for setting aside the contract.

PEACOCK
v.
EVANS.
EVANS
v.
PEACOCK.

There was nothing dishonourable or immoral in Mr. Peacock's conduct : but he has obtained a bargain, of which upon the principles of this Court he cannot avail himself. Therefore upon repaying him his principal and interest he must re-convey the premises in question.

[518]

Upon an application as to costs, *Mr. Richards* for Peacock, insisted, that he was to be considered as a mortgagee ; as in *Gwynne v. Heaton* : † and *Mr. Hart* pointed out the consequence of that by encouraging these bargains.

THE MASTER OF THE ROLLS :

Upon the principle of these cases it is impossible to give costs against Mr. Peacock : whether he is entitled to costs, I a little doubt. In *Twisleton v. Griffith* ‡ Lord COWPER gave the purchaser his costs ; which, when I first read the case, surprised me ; as that was the case, not merely of a young heir, but of a good deal of fraud. Lord COWPER, however, thinking fit to proceed upon the general principle, rather than the fraud, gave him the costs ; considering him as a mortgagee.

The decree was therefore made in the second cause upon payment of principal, interest and costs : in the first cause the bill was dismissed with costs, except as to the depositions : which had been used by the plaintiff in the other cause.

† 1 Br. C. C. 1.

‡ 1 P. Wms. 310.

K. B. TRINITY TERM.

1808.
June 20.

WHITEACRE, ON THE DEMISE OF BOULT, *v.*
SYMONDS.

(10 East, 13—18.)

[13]

A landlord of premises about to sell them gave his tenant notice to quit on the 11th of October, 1806, but promised him not to turn him out, unless they were sold: and not being sold till February, 1807, the tenant refused on demand to deliver up possession. And on ejectment brought; held that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary; and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit.

[*14]

THE day of the demise in this ejectment was laid on the 12th of October, 1806, and at the trial before GROSE, J. in Suffolk, it appeared that the defendant had for many years held the premises in question, consisting of a cottage, barn, and about five acres of land, as tenant from year to year, of the lessor of the plaintiff; who being desirous of selling the property, on the 22nd of March, 1806, served the defendant with a written notice to quit the premises on the 11th of October next (being *Old Michaelmas-day,) from which time the taking had originally commenced. The defendant continued notwithstanding in possession, and this ejectment was brought in Easter Term, 1807. Two letters were given in evidence; one from the defendant to the landlord's agent, dated 1st June, 1807, wherein the defendant stated "my landlord has given me an order to quit the house this month, and has served me with a writ of ejectment. I have lived there many years, and am loth to leave the premises. I did not expect any such treatment from him; you having always promised me that I should not be turned out unless the house was sold. I should be glad to continue until the premises are sold. He has threatened to seize all my property. I should be glad to stay where I am if you approve

of it." The other letter was from the landlord's agent, in answer to the above, dated the 11th of June. "Mr. Symonds, I have just received your letter respecting the quitting of the house at Tritton. You say I promised you should not be turned out, until the place was sold: I did so, and have been as good as my word: for Mr. Boulton (the lessor) sold the place last February to a person at Summerly, for him to have possession at Lady-day last, which I find you have withheld: and you must know that you are wrong in so doing. Had the purchaser not objected to your staying, I should not: but as it now stands I expect you to quit when required," &c. There was also proved an agreement, dated in February, 1807, for the sale of this estate from Mr. Boulton to the purchaser; to whom possession was to have been delivered in March following. The objection was taken at the trial, that the subsequent permission of the landlord, by his agent, for the tenant to continue in possession until a sale, was a waiver of the *antecedent notice to quit, so far as to prevent the tenant from being considered as a trespasser by relation back to the 11th of October, 1806, when the notice to quit expired; although he continued in possession afterwards at the will of the landlord, which might be determined at any time, but which was not in fact determined till Lady-day, 1807, or at least not sooner than the February before, when the contract for sale was made. GROSE, J. however thought that the meaning of the agreement was that the permission to remain in possession was only conditional until a sale; the landlord reserving to himself the power to act upon his notice to quit, if necessary, in case of a sale: and that a sale having been made, and the tenant having refused to quit the possession when demanded of him, the landlord had a right to act upon his original notice to quit: and therefore the plaintiff obtained a verdict; but leave was given to move the Court to set it aside and enter a nonsuit, if the direction were wrong. Accordingly a rule *nisi* was obtained in the last term for this purpose; against which

WHITEACRE
dem. BOULT
v.
SYMONDS.

[*15]

Wilson and *Storks* were to have shewn cause: but *Dampier* was called upon to support the rule; who contended that the tenant, having had an express licence from his landlord to

WHITEACRE
dem. BOULT
v.
SYMONDS.

continue on the premises until a sale, could not be treated as a trespasser during the intervening period, which he must be deemed to be if the notice to quit were good; and therefore by necessary implication it must be taken to have been waived.

* * *

[16] LORD ELLENBOROUGH, Ch. J. :

I cannot construe the language of this correspondence on the part of the landlord, as constituting a new tenancy between him and the defendant after the time of the notice to quit, or as a waiver of that notice: nor was it a licence for the purpose now insisted upon. The landlord was willing indeed to let the defendant remain on the premises till a sale, but he was anxious at the same time to retain, and did reserve to himself, all his rights under the notice to quit, with which he was armed, in order to enforce obedience to that notice if it should be necessary. He said, in answer to the tenant's application, that he would not turn him out until the place was sold; that is in effect saying, that until the place were sold, he would suspend the exercise of his right under the notice to quit: but it could not have been intended to give the tenant such a licence *as would vacate the notice, and be destructive of the right which the landlord was so anxious to retain. No man would grant an indulgence of this sort to his tenant if this use were to be made of it, plainly contrary to the understanding of the person who granted it. Here the landlord has kept his promise, and did not turn out the tenant before he had sold the premises: but the tenant has broken his engagement by not delivering up the possession after the sale, and now ungratefully holds out against his landlord. It was for the tenant to choose whether he would continue to hold on and to expend his money and labour on the premises under such an insecure sort of agreement, but having chosen to run the risk, he must take the consequence.

[*17]

GROSE, J. :

I considered this as an unfair attempt on the part of the tenant to take advantage of and convert that into a right which the landlord meant only as an indulgence to him; to permit him

to stay on the premises until they were sold; but still to retain the right of compelling him to quit under the notice if a purchaser offered. The notice was given and persisted in for the express purpose of enabling the landlord to sell the premises to more advantage, and that, if sold, he might not be disabled from giving possession at the time to the purchaser.

WHITEACRE
dem. BOULT
v.
SYMONDS.

LE BLANC, J. :

If this were to be considered as a licence to the tenant to continue in possession, to be sure he could not be treated as a trespasser until the licence was determined; but upon the construction of the letter, coupled with the situation in which the parties stood at the time, I think it is clear that the landlord neither *intended to grant him a licence, nor to consider him at all as a tenant. Suppose the promise, not to turn the tenant out before the place was sold, had been made before the notice to quit; but the landlord had then informed him that he would not preclude himself if he thought it proper to give him a notice to quit; what objection could have been made to the notice, if it were afterwards given? Then how does it differ the case that the promise, though made afterwards, was made subject to the notice to quit? The landlord insists all along upon his notice to quit, though he promised not to turn the tenant out before the sale.

[*18]

BATLEY, J. :

The fair meaning of the letter is, that the landlord would not bring ejectment to turn the tenant out of possession upon the notice to quit, unless the premises were sold; but that he did not mean to dispossess himself of the legal right to turn him out on the notice after the 11th of October. The only effect of the recovery in this ejectment upon any subsequent action for the mesne profits will be that the day of the demise laid in the declaration in ejectment will be conclusive of the right of the landlord to the possession of the premises from the 11th of October: but the tenant will still be entitled to shew, if he can, that the land had been of no value to him during that time; and then the landlord would only recover nominal damages.

Rule discharged.

1808.
June 21.

HARTLEY v. RICE.

(10 East, 22—25.)

[22]

A wagering contract for fifty guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void; no circumstances appearing to shew that such restraint was prudent and proper in the particular instance.

THE plaintiff declared in assumpsit upon a wager made on the 25th of November, 1799, whereby he betted with the defendant 50 guineas that he the plaintiff should not be married in six years; stating that in consideration that the plaintiff promised to pay the defendant 50 guineas in case he, the plaintiff, should be married within that time, the defendant promised to pay the plaintiff the like sum if the plaintiff should not be married within that time. And then the plaintiff averred, that from the time of making the promise he has not been nor is yet married, but during all the time has remained and still is unmarried; whereby the defendant at the expiration of six years from the making of the promise became liable to pay to him the said sum, &c. To this the defendant demurred specially, on the ground that the contract declared on was illegal and void; the same having been entered into in restraint of marriage, and tending to prevent the plaintiff from marrying during the six years, &c.

[After argument:]

[23] LORD ELLENBOROUGH, Ch. J.:

[*21] On the face of the contract its immediate tendency is, as far as it goes, to discourage *marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to shew that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract. Wagers in general are seldom indifferent in their tendency, and this certainly is not so.

GROSE, J. :

HARTLEY
v.
RICE.

Every contract in restraint of marriage is illegal, as was said by Lord HARDWICKE.† But this is endeavoured to be distinguished from former cases, as not being a total and indefinite restraint of marriage : that however must depend upon the duration of the party's life. If good for six years, why not for a longer period ?

LE BLANC, J. :

This case is presented to us stripped of all particular circumstances, and therefore must be determined by the general rule of law. Now it is impossible to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years : but a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law : and nothing is stated here to shew it to be otherwise in the particular instance.

BAYLEY, J. :

This wager is calculated to operate against marriage, and no prudential reasons are shewn to have *conduced to it in this instance ; therefore it falls within the general rule, that being a contract in restraint of marriage generally, it is void.

[*25]

Judgment for the defendant.

THOMAS v. EVANS.

(10 East, 101—103.)

1808.
June 30.

To make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. Therefore where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff ; of which the clerk informed the plaintiff when he called and demanded a larger sum ; and the plaintiff said he would not receive the 10*l.*, nor anything less than his whole demand ; but the clerk did not offer the 10*l.* : this was held to be no tender.

[101]

THE question turned upon a plea of tender of 10*l.* in assumpsit ; on which the evidence was, that the defendant, having been employed as attorney for the plaintiff, had in that character

† Vide *Woodhouse v. Shepley*, 2 Atk. 540.

THOMAS
v.
EVANS.

received for his use 10*l.* in part payment, and on going from home for a time left the 10*l.* with his clerk there. That some time after the plaintiff called and demanded 16*l.* 8*s.* 11*d.*, which he said he supposed Evans had received; when the clerk told him that Evans was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand. (At that time no more had been received, though the remainder has been since received by the defendant.) The clerk did not offer the 10*l.* And thereupon it was objected that this was not sufficient evidence to support the plea, and Graham, B., before whom the case was tried at Monmouth, being of that opinion, directed the jury to find a verdict for the plaintiff for the 10*l.*; which they did.

[102]

Dauncey, in the last Term, moved for a new trial, on the ground that the declaration of the plaintiff, that he would not receive the 10*l.* left with the clerk, excused the latter for not holding the money out to him in his hand, and made the offer to pay it a sufficient tender in law. And he referred to *Douglas v. Patrick*.† * * He now supported his rule on the same ground; being called upon by the Court, who thought it unnecessary to hear *Abbott*, *contra*.

LORD ELLENBOROUGH, Ch. J. :

The learned Judge's direction was right. The actual production of the money due, in monies numbered, is not necessary, if, the debtor having it ready to produce and offering to pay it, the creditor dispense with the production of it at the time, or do any thing which is equivalent to that. But here, on the contrary, it is expressly stated, that the clerk did not offer the 10*l.* He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it: which is not a tender in law.

[103]

GROSE, J. :

Either there must be an actual offer of the money, or the

† 1 R. R. 793 (3 T. R. 693).

party must be ready to pay it at the time when the actual offer of it is dispensed with.

THOMAS
r.
EVANS.

LE BLANC, J. :

There must either be an actual offer of the money by the one party, or a dispensation of such offer by the other : and here there was neither.

BAYLEY, J. was of the same opinion, and referred to the case of *Dickinson v. Shee*, before Lord Kenyon, 4 Esp. N. P. 68, in confirmation of it. There the defendant went to the plaintiff's attorney, and saying that he was come to settle with him the plaintiff's account, produced a paper containing the statement of the account, in which he made the balance 5*l.* 5*s.*, which he said he was ready to pay, but produced no money nor notes. The plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.* This was held to be no tender : for there should have been an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money as he would not accept it.

Rule discharged.

PEACOCK, ADMINISTRATRIX OF PEACOCK, *v.*
HARRIS.

(10 East, 104—108.)

1808.
June 30.

[104]

A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the Act of Parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate ; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* enclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls.

THE plaintiff declared, in assumpsit, that the defendant was indebted to the intestate as farmer and renter, appointed according to the statute, of the tolls payable at a certain turnpike-gate,

PEACOCK
v.
HARRIS.

[*107]

account previously in the contemplation of the parties, which, not being specified in the terms of the letter, was to be ascertained by the jury from the rest of the evidence, and the circumstances of the case; and they by their verdict have ascertained it to relate to the account of the tolls, which it appears was *before that time sent in to the defendant: and that is evidence of an account stated between them. Then it is said that this account was stated, with respect to the intestate, in a character in which by law it could not exist, because he was not legally appointed collector of the tolls. But if the defendant accounted with him in that character, having received credit from him as such, thereby admitting him to be a person to be accounted with for the tolls, he shall not now be permitted to dispute his title to recover the balance of that account. In like manner as a tenant is taken to admit the title of the landlord under whom he holds, and which he is not permitted afterwards to dispute. It is a different question, whether the commissioners might not dispute the intestate's title to receive the tolls: though that might be the ground of an equitable account. But I do not think it necessary to resort to the ground of an equitable account stated; for I go upon this, that the defendant has recognized the title of the party with whom he has accounted. Therefore finding nothing illegal in the items of the account, no breach of duty in the intestate, no compounding of the tolls in fraud of the Act of Parliament, but only giving credit for them to a future day; no collusive bargain in prejudice of the commissioners; and considering that the defendant, who has accounted with the plaintiff, has thereby recognized her title to receive the tolls on account of the intestate, I think the verdict ought to stand.

GROSE, J. was of the same opinion.

LE BLANC, J.:

[*108]

I am glad that a medium of proof has been found to sustain the justice of the case. It was a question *for the jury to decide, whether by the defendant's having received the account of the tolls, and making no objection to it, he did not recognize that so much was due from him on that account. But it is said that

there is a fundamental objection to the character in which the plaintiff sues; for that the intestate, not having been legally appointed collector, must be taken to have received the tolls merely as the servant of the trustees. But as neither the trustees nor the creditors of the turnpike make any objection to his title, shall it be permitted to a third person, after having treated with the intestate as a person legally entitled to receive the tolls, and having actually settled an account with him for the amount, shall it be permitted to such an one now to object to the plaintiff's recovery, not upon the special count, but upon the account stated? It has been also objected, that the tolls are not the subject of an action: but, if refused, could only be levied by distress upon the carriage, &c. when passing. The Act, however, only says that they shall not be compounded for; it does not say that credit shall not be given for them, where there is no collusion. Therefore when the jury have found that the defendant has accounted with the plaintiff for these very tolls upon the footing of the intestate's title, he shall not be permitted now to dispute that title upon the count for the account stated.

PEACOCK
v.
HARRIS.

BAYLEY, J. concurred.

Rule discharged.

HIGHAM, AND ELIZABETH HIS WIFE, v. RIDGWAY.†

(10 East, 109—123.)

1808.
June 30.
[109]

If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death. And therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.

UPON error brought to reverse a recovery suffered by Wm. Fowden, the younger, of certain lands in the county palatine of Chester, of which he claimed to be first tenant in tail under indentures of the 16th and 17th of December, 1763, it appeared

† *R. v. Exeter* (1869) L. R. 4 Q. B. 341, 345.

HIGHAM
 C.
 RIDGWAY.

that the premises were limited in remainder to the first son of the body of Wm. Fowden, the father, in tail, with remainder to the second and other sons in tail, remainder to the daughters in tail: under which last limitation the plaintiff Elizabeth claimed, in default of heirs male of Wm. Fowden the father, as heir of the body of Mary, his only daughter. The record set forth the recovery, which was of the Session at Chester, on the 16th of April, 29 Geo. III., and appeared to have been acknowledged at Macclesfield on the 15th of April, 1789, and that an affidavit was sworn on that day by Wm. Morley, Wm. Fowden, sen., and Mary the wife of John Orme, in which Wm. Fowden, sen. swore that Wm. Fowden the younger was born on the second of April, 1768, but that being a protestant dissenter, no entry was made of his baptism in any register. And Mary Orme swore that she was aunt to Wm. Fowden, jun., and well remembered that he was born in the beginning of April, and before the 15th day of that month in the year 1768. And the error assigned was that it appeared in the record, &c. that Wm. Fowden, jun., on Friday in the aforesaid Session at Chester, appeared by attorney and warranted the tenements, &c. to E. (the tenant), &c.: but that Wm. *Fowden, jun. was then an infant within the age of 21 years, viz. 20 years and no more. And on joinder in error, the issue was, "Whether Wm. Fowden, the younger, at the time of his appearance and warranty, and voucher to warranty, and also at the time of the giving of the said judgment (of recovery) was an infant within the age of 21 years, to wit, of the age of 20 years and no more."

[*110]

At the trial at Chester it appeared that Wm. Fowden, jun. died on the 31st of December, 1792, having before made his will, and Wm. Fowden, sen. the father, died on the 20th of March, 1806: but Mary Orme, the aunt, was still living, and examined as a witness by the defendant in support of the fact as sworn to in her affidavit; but the accuracy of her recollection as to the precise day of her nephew's birth was rendered doubtful by circumstances which came out upon cross-examination. And on the part of the plaintiffs, it was, amongst other things, proved by a neighbour that Wm. Fowden, the father, and his wife, lived at Bramhall, where William, the son, was born; that it was on

a Friday. That he was desired by the father to fetch Mr. Hewitt, the man-midwife, who lived at Stockport, about three miles and a half distant : the witness, however, had occasion to go elsewhere, and another person was sent to Mr. Hewitt, and on the witness's return the same evening Mrs. Fowden was brought to bed of a son. That the wife of Richard Fallows, who lived half a mile off, was also delivered on the same day. The person who was sent to Mr. Hewitt's corroborated this account, and knew young Fallows and young Fowden as they grew up, who appeared about the same age. Another witness also proved the birth of young Fowden on a Friday, (the particular *day of the week was proved by reference to market day and other collateral circumstances by the several witnesses), and that he saw Mr. Hewitt at Fowden's house. Fallows, the son, also proved his growing up with Wm. Fowden, the son ; that they used to dispute which was the eldest ; but they were both born on the same day ; and he had been told this by Fowden's father and mother. His own birthday was on the 22nd of April. Other witnesses also deposed to the same effect. John Hewitt was then called, the son of the man-midwife who delivered Mrs. Fowden ; and he proved the death of his father 20 years before, and produced certain books (on which the question of evidence arose) in which his father had been used to make regular entries of all matters relating to his business, with their dates, immediately on his return home : and the entries in question were proved to be in his father's hand-writing. These entries were tendered in evidence to shew the precise day of the birth of Wm. Fowden, jun. The evidence was objected to ; but the Court determined to receive it, reserving the point. The entries in question (which were preceded and followed in order of time by others of the like nature) were as follows :

HIGHAM
v.
RIDGWAY.

[*111]

✓

“ 22 April, 1768.

38.† Richard Fallows's wife. Bramhall. Filius circa hor. 9, matutin : cum forcepe, &c.

Paid.”

† The figures 38 referred to the ledger.

HIGHAM
v.
RIDGWAY.

Then followed in the same page the entry in question, without any intervening date.

[112] “ √. Wm. Fowden jun^r † wife. 79.‡
 filius circa hor. 3 post merid. nat. &c.”

“ Wm. Fowden jun^r. 1768.

Aprilis 22. Filius natus, &c.

wife	—	—	1	6	1
26th. Haustus purg.	—	—	0	15	0

Pd. 25th Oct , 1768.”	2	1	1
----------------------------------	---	---	---

The jury found, on this evidence, that Wm. Fowden, jun. who suffered the recovery, was not born on the 2nd, but on the 22nd of April, 1768.

Topping and Yates shewed cause against a rule for a new trial, and contended that the entries in question, proved to be in the hand-writing of the man-midwife, and to have been regularly made from time to time in the course of his business, were evidence of the time of the birth of Wm. Fowden the son, as having been made by a person possessing a competent knowledge of the fact, and discharging the party on whom he had a claim in the first instance for his medical attendance. Similar evidence has been admitted in other cases. In *Warren d. Webb v. Greenville*§ the question was, Whether there had been a surrender of part of the estate, which was in jointure to the widow at the time of the recovery suffered by the son tenant in tail; without which there was no *good tenant to the præcipe for that part, and the recovery was ineffectual for so much. It was insisted that a surrender should be presumed at that distance of time; || and to fortify that presumption the debt-book of the family attorney, who was dead, was produced, wherein he

[*113]

† This was the designation at the time of the father of the William Fowden, jun., in question.

‡ These figures referred to the

ledger, the entry in which follows.
§ 2 Stra. 1129.

|| The trial was in 1740.

charged so much for suffering the recovery, including several items for drawing and engrossing the mother's surrender: all which charges appeared by the book to have been paid. And this was held to be good evidence after the death of the attorney, who, if living, might have been examined to the fact. This report of the case is in the main confirmed, as to this point, by Lord MANSFIELD, in *Goodtitle d. Brydges v. The Duke of Chandos*; † with this addition, that a receipt had been given upon the bill, which contained the articles, for drawing and engrossing the surrender. Though Lord MANSFIELD seems to have thought that Sir John Strange had not laid sufficient stress in his report upon the presumption arising from length of time. So rentals or steward's accounts, with payments marked on them, are always received in evidence,‡ even against third persons. In *Herbert v. Tuckal*,§ upon a question, whether one was of full age when he made his will, an entry made by his father in an almanack of the day of his son's birth was allowed by the Court, on a trial at bar, to be strong evidence: and yet that was no question of pedigree, and therefore not within the exception which allows the hearsay declarations of the family to be evidence in such cases, any more than the declaration of a father as to the place *of his son's birth; which was rejected as evidence in *The King v. The Inhabitants of Erith*. ||

HIGHAM
v.
RIDGWAY.

[*114]

Manley, Serjt., and *John Williams*, *contrà* :

The question, whether these entries be evidence, cannot depend on their apparent accuracy, but on this, whether the declarations of a third person, by parol or in writing, as to a fact, which may be supposed to have been within his knowledge at the time, can, after his death, be given in evidence, merely because in the same breath or writing, he admitted that a claim of his own respecting such fact, if true, had been discharged. * * The admissibility of the evidence stands wholly upon the

[115]

† 2 Burr. 1071, 2.

v. *Heaton*, 4 T. R. 669.

‡ 12 Vin. Abr. 90, tit. Evidence,
pl. 13 and 14; *Barry v. Bebbington*,
2 R. R. 450 (4 T. R. 514), and *Stead*

§ T. Ray. 84.

|| 8 East, 539.

HIGHAM
v.
RIDGWAY.

ground that the entry made by him, taken altogether, discharged his own claim. All the cases on this head rest upon the original authority of *Warren d. Webb v. Greenville*,† which by the explanation afterwards given of it by Lord MANSFIELD,‡ turned mainly upon the presumption of the surrender arising from lapse of time : and his very solicitude to explain this shews that he was not so well satisfied of the admissibility of the entries in the attorney's bill book, which he says was strongly litigated : and he concludes his observations by saying that Sir J. Strange's report is incorrect. Both in *Barry v. Bebbington*,§ and in *Stead v. Heaton*,|| the persons whose entries were given in evidence had in the first instance charged themselves with the receipt of money, for which they were accountable to others, to whom their accounts were delivered : but where the entries of the receipt of rent had been made by the owner of the estate himself, as in *Outram v. Morewood*,¶ they were held not to be evidence even to prove the identity of the land in a cause between other persons. And on the same principle Lord KENYON, in the case of *Calvert v. The Archbishop of Canterbury*,†† ruled that an entry of an agreement for a pair of horses, made in the plaintiff's books by his servant, who was dead, was not evidence to charge the defendant for the hire of them, because the servant did not thereby charge himself. So this, being an entry made merely for the party's own use, must be considered as *res inter alios acta*. The case of *Roe d. Brune v. Rawlings*‡‡ went on a different ground ; for there the letter written by a former steward of the estate to the then tenant for life, containing a particular of the ancient rents, &c. was by him handed down amongst the muniments of the estate to the succeeding tenant for life, and preserved by each against his own interest, as an authentic document ; and on this ground it was held to be evidence of the ancient rent against the lessee of the last tenant for life, by whose acknowledgment of the fact such lessee was bound. They also noticed that the apothecary's

† 2 Stra. 1129.

‡ In *Goodtitle v. Duke of Chandos*,
2 Burr. 1072.

§ 2 R. R. 450 (4 T. R. 514).

|| 4 T. R. 669.

¶ 5 T. R. 121.

†† 2 Esp. N. P. Cas. 646.

‡‡ 8 R. R. 632 (7 East, 279).

[*116]

discharge of his demand was not made upon the entry as to the time of the child's birth, but only in the ledger to which the entry referred. And they observed upon the dangerous consequence of introducing a laxity in the rules of evidence by extending the exceptions of hearsay evidence of particular facts beyond the strict question of pedigree, and that class of cases where entries had been made by stewards and such like, to charge themselves in account with the payment over of sums they had received in right of others, to whom those accounts were delivered.

HIGHAM
v.
RIDGWAY.

LORD ELLENBOROUGH, Ch. J. :

I should be extremely sorry if any thing fell from the Court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property : but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren v. Greenrille*. The question is, Whether the *books of a man-midwife, attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves, as recording this event of the birth and other similar events in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c. received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted ; namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to

[*117]

HIGHAM
v.
RIDGWAY.

[*118]

the wife; and the period of her delivery is the time for which the former charge is made; the date of which is the 22nd of April; when, it appears by other evidence, that the man-midwife was in fact attending at the house of Wm. Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say that the word "paid" only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry, *of which it is explanatory. So far, therefore, the case of *Warren v. Greenville*, if it be law, is an authority in point to the present case. But it is supposed that after the evidence of the solicitor's book there had been received, the Court had repented of their decision, and put the case to the jury entirely on the presumption of a surrender from length of time. But how does that appear, either upon the report in *Strange*, or by what fell from Lord MANSFIELD in the case in *Burrow*. *Warren v. Greenville* was decided in the year 1740, about 40 years after the time when it was insisted that the surrender should be presumed to have been made. And to fortify that presumption, the report says that the defendant offered the attorney's debt-book in evidence, containing charges for drawing and engrossing the surrender, which it appeared by the book were paid. This evidence was objected to, but allowed by the Court, who thought it material, upon the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for this purpose. The entries were read accordingly. But the Court afterwards declared "that without that circumstance they would have presumed a surrender: and desired it might be noticed that they did not require any evidence to fortify the presumption after such a length of time." Now what is the fair inference to be collected from that report? not that the Court doubted at all whether the evidence of the entries in the book had been properly received: but that they were afraid that by fortifying and buttressing up, by this further

evidence, a presumption so strong from the mere lapse of time they might be supposed to have weakened that presumption; which they wished to guard against. And this is in substance the account which Lord MANSFIELD himself *gives of that decision in the case in Burrow. But he also states that the point of evidence was strongly litigated; which shews that it did not pass without much discussion and consideration: and his account of the fact there given in evidence, so far from shewing the report to be incorrect, is a strong confirmation of it in the material circumstance. Here it appears distinctly from other evidence that there was the work done for which the charge was made: for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered: and the discharge in the book, in his own handwriting, repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this case was properly received, as well upon the authority of the case of *Warren v. Greenville* as upon principle.

HIGHAM
C.
RIDGWAY.

[*119]

GROSE, J. :

General rules of evidence are of the greatest consequence; for either admitting evidence of a fact when it should be excluded, or rejecting it when it ought to be admitted, would shake the security of all property: the right decision, therefore, of every case of this sort is of great importance. But it is very difficult sometimes to distinguish the nice shades of difference between cases of this description; and therefore I am always glad to find an express authority on which I can set my foot. The case of *Warren d. Webb v. Greenville* is of that sort, *which ought not now to be called in doubt, having been confirmed in the subsequent case by Lord MANSFIELD, and since that again by this Court. Relying, therefore, upon that authority, which applies most strongly to this case, I think the evidence was rightly

[*120]

HIGHAM
v.
RIDGWAY.

admitted. And even without the entries, I think there was evidence sufficient to find the verdict which has been given, though those entries put the matter out of all question.

LE BLANC, J.:

On inquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility by lapse of time of proving those facts in the ordinary way by living witnesses. On this ground, hearsay and reputation, (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another), have been admitted as evidence in particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family bibles. The like evidence has been admitted in other cases, where the Court were satisfied that the person whose written entry or hearsay was offered in evidence had no interest in falsifying the fact, but on the contrary had an interest against his declaration or written entry; as in the case of receivers' books. I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person: it is not necessary now to determine that question; but

[*121]

*I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of the case of *Warren v. Greenville*, and of all those cases where the books of receivers have been admitted. I understand the expressions used by Sir John Strange, in his report of that case, very differently from what they have been argued to mean. There was a presumption there of a surrender from the circumstances of the case, and from length of time; and besides that presumption so arising, there was a confirma-

tion of it by the entry in question. The Court only said that there was sufficient to presume the surrender, without the evidence of the entry; but not that they had any doubt that the entry was evidence. And this account of it is, I think, confirmed by Lord MANSFIELD in the case in Burrow; who says that the point was much debated, and explains the observation made by Sir John Strange at the conclusion of his report. Then I cannot distinguish this from the case of *Warren v. Greenville*, nor from those of receivers' accounts, nor from *Roe d. Brune v. Rawlings*. The reasons given for admitting the evidence in the latter case apply also to the present, though I think in a much stronger degree. And I cannot agree to distinguish the entry from the ledger in favour of the objection; for in the ledger, in which Hewitt discharges his claim, the date is mentioned; but at any rate that is not weakened by its correspondence with the other entry.

HIGHAM
v.
RIDGWAY.

BAYLEY, J. :

[122]

This was no officious entry made by one who had no concern in the transaction: he had no interest in making it: and as he thereby discharged an individual against whom he would otherwise have had a claim, I think the entry was evidence by all the authorities. There were two entries read, the one following the other, without any intervening date; the first of these, relating to Fallows, is dated the 22nd of April, 1768; and this is marked as paid: the next, as to Fowden, is not stated there to be paid; but it refers to a particular page in the ledger, where the charge against Fowden is made, including items, one of which is for delivering his wife, corresponding in date with the former entry; and there he states himself to have been paid for his work and medicines. Therefore, if he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now all the cases agree, that a written entry, by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry. In *Outram v. Morewood* the entry made was for the

HIGHAM
v.
RIDGWAY.

[*123]

party's own interest who made it; for he entered the receipt of rent from another person; therefore, if that had been evidence for him, or for those claiming under him, it would have been furnishing evidence for himself of a right to the estate. But the principle to be drawn from all the cases, beginning with *Warren v. Greenville* down to *Roe v. Rawlings*, is that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence *after his death, if he could have been examined to it in his life-time.† And that principle has been constantly acted upon in the case of receivers' accounts.

Rule discharged.

1808.
July 4.

REID v. DARBY.

(10 East, 143—157.)

[*143]

The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be seaworthy or repairable so as to carry the cargo to its place of destination but at an expense exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to sell the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised *bonâ fide* in a case of necessity, still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the Register Acts: and the requisites of those Acts not having been complied with, the sale in question was held to transfer no property to the vendee.

[*144]

TROVER for the ship *Glamorgan*. At the trial at Guildhall a special case was reserved, stating that the plaintiff, being the sole owner of the *Glamorgan*, belonging to the port of London, and duly registered there *on the 8th of December, 1803, sent her in the spring of 1805 on a voyage from London to Antigua and back again, under the command of Capt. Shelly. The ship delivered her outward cargo at Antigua, and took in her homeward cargo, and arrived at Tortola to join convoy for England,

† This qualification is repudiated *Gleadow v. Atkin* (1833) 3 Tyrwh. by the judgment of BAYLEY, B., in 289, 302.—R. C.

REID
v.
DARBY.

on the 16th of November, 1805. On her arrival at Tortola, being leaky, the master applied to the Vice-Admiralty Court there for a survey, when certain proceedings were had, which were stated at length in the case. 1. The petition for a survey, dated 18th of November, 1805, and exhibited by a proctor on behalf of the master, and intituled, "Tortola—Instance Court—The ship *Glamorgan*—J. Shelly, Master—In the matter of the survey of the ship *Glamorgan*, J. Shelly, master, put into this port in distress." In this the leaky and dangerous condition of the ship before her arrival at Tortola was stated (and verified on the oath of the master): "and that the master was desirous of having a regular survey held on the said ship; Wherefore the said proctor prayed, and the Judge at his petition decreed, the usual writ of survey to issue, directed to" certain persons by name, merchants and ship-masters. 2. The commission or writ of survey, of the same date, issued thereon to the persons named, authorizing them to view the state and condition of the ship, and to report thereon to the Court, and particularly whether the ship were seaworthy or not; and if she could be properly repaired in Tortola, so as to render her seaworthy: and this return was to be made on oath. 3. Several reports, returned on oath by the different persons authorized, which in substance declared the ship to be totally unfit, in her then state, to proceed with her cargo, and that the expense of repairing her at Tortola would be more than her value when *repaired. These returns were dated 20th of November and 2nd and 5th of December, 1805. 4. The decree of the Court, dated 5th of December, 1805. "The Judge, having heard the said proofs read, pronounced that it appeared to him that the said ship is totally unfit to proceed with her cargo to London, her port of destination, and that the repairs of the said ship in this port (Tortola) would amount to more than her value when such repairs should have been completed." 5. The act to lead commission of sale, dated 16th of December, 1805, which, after noticing the returns made as above, stated, "that for the benefit of those concerned the master was desirous of selling the said ship and her cargo in this port (Tortola), and that he wished to obtain a commission directed to the Marshal of the V.-A. Court for that purpose:

[*145]

REID
v.
DARBY.

[*146]

Wherefore the Judge, at his petition, decreed a commission, &c. to sell and dispose of the said ship and cargo for the benefit of those concerned." Then followed 6. The commission of sale, dated 16th of December, 1805, stating the previous proceedings, and "that for the benefit of those concerned the master was desirous of selling the said ship and cargo," &c. and to obtain a commission for that purpose: wherefore the Judge decreed a commission, &c. and authorized and commanded the marshal to expose to sale and sell the ship and cargo to the best bidder, and to "pay the produce-money arising from such sale to the said J. Shelly, on behalf of the persons entitled thereto, first deducting thereout the expenses of the said survey and sale;" and to transmit an account of the sale to the Judge. The case then stated that under this sentence the ship was sold by the marshal of that Court to the defendant for 885*l.* currency, which was received by Shelly, the *master, pursuant to the order, who has paid no part of it to the plaintiff, claiming to have an account against him; and possession of the ship was delivered by the marshal to the defendant. The defendant, on the 25th of January, 1806, procured the ship to be registered *de novo* at Tortola, and obtained a certificate thereof; in which it was stated that he was the sole owner of the ship *Glamorgan*, of Tortola, and that the ship was built at Neath, in the port of Swansea in 1789, as appeared by certificate of registry, No. 438, of the 8th December, 1803, which was "delivered up and cancelled, on account of the said vessel having put into this port (Tortola) in distress, and having been condemned as unfit to proceed on her voyage, and been sold for the benefit of the underwriters or others concerned." Stating further the build of the ship, &c. The defendant, after obtaining such certificate at Tortola, sent the ship to Nevis, where she arrived on the 2nd of February, 1806, and where he procured her to be again registered *de novo*, and obtained another certificate, dated 13th of February, 1806, in which it was stated that he was the sole owner of the ship *Glamorgan*, of Nevis, and that the said ship was built at Neath, in the port of Swansea, in 1789, as appeared by certificate of registry, granted at Tortola the 25th of January iast, and now given up and cancelled on account of the aforesaid

REID
v.
DARBY.

owner becoming a resident of this said island. The defendant afterwards sent the ship from Nevis to Grenada, and from thence with a cargo of sugar and rum to London, where she arrived in July, 1806, and delivered it in good condition. On the 4th of August, 1806, the plaintiff demanded the ship of the defendant, which he refused to deliver up. The collectors of the customs at Tortola and Nevis transmitted *copies of their respective certificates to the collector at the port of London, who caused the following memorandum to be made in the book of registry at London. "Condemned at Tortola and registered *de novo*, 25th January, 1806." The original London certificate of registry has not been transmitted. No bill of sale, reciting any certificate of registry of the ship, has been made to the defendant; nor has any copy of any such bill been delivered to the person authorized to make registry and grant certificates of registry at the port of London; nor any indorsement of or relating to the transfer of property in the ship to the defendant been made on any certificate of registry of the ship; nor any copy of any such indorsement been delivered to the person authorized to make registry, &c. at the port of London; nor any entry been indorsed on the oath or affidavit upon which the original certificate of registry was obtained; nor any memorandum made in the book of registry at the port of London; nor any notice given to the commissioners of the customs in England, otherwise than before mentioned. The question for the Court was, Whether the plaintiff were entitled to recover the value of the ship, and any and what special damage? If the plaintiff were entitled to recover, a verdict was to be entered for him, and the damages were to be ascertained by an arbitrator. If the plaintiff were not entitled to recover, a nonsuit was to be entered. This case was argued in Hilary Term last by

[*147]

Richardson for the plaintiff, who contended that the master had no general authority, as such, to sell the ship, and could derive none from a voluntary proceeding, instituted by himself for that purpose in the Vice-Admiralty Court: but that if he had in himself, or could derive from that Court, any such power, the property *could only be transferred according to the forms

[*148]

BEID
v.
DARBY.

of the Registry Acts. 1st, The master is considered as the agent for his owners for many purposes: he may hire mariners, procure necessaries for the ship and crew, and in case of necessity may hypothecate the ship in a foreign port; but he cannot sell the ship itself. His authority is to use and employ the ship; but it is contrary to the nature of such an authority to sell what he is to employ. It was so held in *Tremenhere v. Tresillian*,† which was a case of strong necessity for the sale by the master abroad, if any thing could justify it; but HALE, C. B. was of opinion that the master, without the owner, could not sell the ship. The same general doctrine was laid down by Lord ELLENBOROUGH in *Hayman v. Molton* and others;‡ though he was inclined to admit that in cases of extreme necessity,§ where a ship abroad had received irremediable injury, the captain might have such a power. There, however, the jury found for the owner on the ground of a fraudulent sale. At any rate, however, this was not a case of necessity, in the true sense of the word, a necessity which supersedes all discretion; it was rather a case of supposed expediency; in which, as it turned out the master was mistaken; for the ship was actually repaired, and proceeded on a voyage out and home. The true line is, that while the subject-matter, which he is entrusted to navigate, continues as a ship, and capable of navigation, with such repair as is to be had, he cannot *sell it; he can only sell the materials when it is broken up or become a mere wreck. 2ndly, Supposing the master had the power of sale under these circumstances, he can only transfer the property by observing the requisites of the Register Acts,|| all of which may be complied with, as well in the case of a sale by the master, as by the owner. The master can only sell, if at all, as agent of the owner, and an agent must always convey in the same form as his principal must have done. * * *

† 1 Sid. 453, and 3 Keb. 91 S. C. which cites *Bridgman's* case, Hob. 11.

‡ 8 R. R. 837 (5 Esp. N. P. Cas. 65).

§ In *Jenkins' Rep.* 165, which was mentioned by Lord ELLENBOROUGH upon this occasion, the Reporter says,—“Observ. Nota that the master of a ship, in case of danger and

extremity, may cast the goods into the sea, and in some cases sell the ship, although it does not belong to him, as in case of famine,” &c.

|| The Act then in force was 34 Geo. III. c. 68. Sections 14, 15, and 16, were referred to. See now 17 & 18 Vict. c. 104, ss. 45, 55.—R. C.

Scarlett, contra :

REID
v.
DABBY.
[150]

The question is whether when a master of a ship on a distant voyage, exercising an honest judgment, believes his ship to be absolutely incapable of completing her voyage, he may make a sale of her on account of his owners, so as to bind them? If such a power exists at all, it cannot in the nature of it be confined to such cases of necessity in fact as supersede all discretion. Every question of necessity is a mixed question of fact and of judgment: the subsequent events cannot make any difference: but the consideration must be the same as if the purchaser had been obliged to break up the ship immediately. In this case the jury have concluded the question of necessity by their verdict. As a general rule, it may be admitted that the master cannot sell,† though he may hypothecate the ship for repairs and necessaries furnished abroad: but that rule only applies so far as to negative any implied authority from the owner to the master to put an end to the adventure by the sale of the ship: but where the adventure is absolutely put an end to by the perils of the sea or the like, there is no rule of law to prohibit the master from acting according to the best of his judgment for the benefit of his owner by selling the ship. In the case of *The Betty Cathcart*,‡ which was that of a British ship, sailing *without a register from circumstances of necessity; Sir WM. SCOTT said that the revenue and navigation laws were to be construed and applied with great exactness; but that cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or had acted at least for the best, must be considered in that system of laws just as in other systems; and that laws that would not admit of an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. And there he decreed the vessel not to be forfeited. So in the case of the *Gratitudine*§ it was admitted that, generally speaking, the master has no authority over the cargo for the purposes of sale, but only for safe custody and

[*151]

† *Johnson v. Shippen*, 2 Ld. Ray. 981.

‡ 1 C. Rob. Adm. Rep. 221.

§ 3 C. Rob. A. R. 240, 257, 259, 260.

REID
 †.
 DARBY.

[*152]

conveyance; and yet, said the same learned Judge, in cases of instant, unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him, not by the appointment of the owner, but by the general policy of the law, to protect the property. And he instanced the throwing overboard part of the cargo at sea, in imminent danger, to preserve the remainder; and the case of ransom. That there were other cases where the master had the same authority forced upon him in port; as if the ship were driven into port with a perishable cargo, and unable, or wanting repairs to enable her, to proceed in time. In that case, said he, he must exercise his judgment, whether to transship or sell the cargo; and even though he had the means of transshipping, he may act for the best in deciding to sell. But if he acted unwisely *in that decision, still the foreign purchaser would be safe under his acts. And there it was held that he might in a case of distress hypothecate the cargo for repairs of the ship. Sir Wm. Scott, in the same case, adverted to the practice in question, of applying to the V.-A. Courts in the West Indies for leave to empower the master to sell: and though he says it has been a matter of complaint that this power was sometimes abused, yet he admits its existence in cases of real necessity. “Necessity,” he says, in another part,† “creates law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal.” In the case of a ship cast on shore, if anything escaped alive, the property saved was not to be considered as wreck, but by stat. of Westm. 1, c. 4, was to be preserved by the sheriff, &c. a year and a day for the benefit of the owners. Yet, says Lord Coke,‡ in his comment on it, if the goods be perishable, of necessity, (which is excepted out of the law) the sheriff may sell such goods within the year. It is the common practice of merchants, for the captain to make what salvage he can of the goods, as well as of the ship, in all cases of danger and distress: and this is recognized in the form of marine policies.

LAWRENCE, J.: It was held in *Milles v. Fletcher*,§ that where the ship was captured and recaptured, but the voyage was lost,

† 3 C. Rob. A. R. 266.

‡ 2 Inst. 168.

§ Dougl. 230.

and the captain acting for the best had sold the ship and cargo, the owner might recover against the underwriters for a total loss.)

REID
v.
DABBY.

What is the master to do in such cases, if he have no power to sell? he must either suffer the vessel to perish, or it must be preserved at an expense greater than its value. 2ndly, If the master have such a *power, this is not a case within the Register Acts. All the requisites of those Acts could not have been complied with; which shews that none of them were meant to apply to the case of a sale under a power given by law, and not by the act of the party; and that was the distinction on which *Bloxam v. Hubbard* † was decided. The 16th section of the stat. 34 Geo. III. c. 68, which comes nearest to the present case, namely, where the owner is at home, and the ship is sold abroad, only applies, however, to the case of voluntary transfers of ships; and not to cases where the owner ceases to have any interest in the subject matter as a ship, and only sells it as a wreck, or the materials of a ship. The Registry Acts certainly would not apply to the case of hypothecation, and by the same rule not to a sale by the like necessity.

[*153]

(LAWRENCE, J. : A ship may be worth repairing to a person on the spot, though not so to the owner in England.

LORD ELLENBOROUGH, Ch. J. : It is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo.

LE BLANC, J. : While the subject-matter is in the form of a ship, though wanting repairs, which, perhaps, it might not be worth the owner's while to make, would not the provisions of the Register Acts continue to apply to it, if it were in a British port?

LORD ELLENBOROUGH : Must we not consider under the Register Acts, whether the vessel were sold as a ship, capable of repair, or as a mere wreck ?)

† 5 East, 407.

REID
v.
DARBY.
[*154]

3rdly, As to the jurisdiction of the V.-A. Courts to order sales in such cases; it has been frequently exercised of late years, though there is no express adjudication upon the point. The words, however, of their commission are very large and *general, extending to all suits, &c. to all cases of wreck and derelict. If, then, the captain could not sell, and did not think it was worth while to repair, he must abandon the ship; and then it is clear that the Admiralty Court would have jurisdiction. This consideration forms some check on the abuse of the power; for the master must submit in the first instance a case to that Court, in which he would be obliged to abandon the ship, if he were not empowered to sell it.

(Lord ELLENBOROUGH: How can this be considered as a derelict on the high seas, which was in port and under the captain's control all the time?)

Sir Wm. SCOTT, in the case of the *Gratitudine*, seems to recognize the practice as exercised under the Admiralty jurisdiction. At any rate the defendant is entitled to be considered as the salvor of the ship in this case; the master having abandoned her, and the defendant having brought her home in safety; and therefore the plaintiff cannot maintain trover, without a tender of the salvage.

(Lord ELLENBOROUGH, Ch. J.: If the sale by the master were a tortious act, the defendant cannot thereby acquire a lien on the ship.)

No tort was meditated by the master, and there is no privity between him and the defendant, who purchased under the sale decreed by the V.-Admiralty Court.

Richardson, in reply, maintained that the sale was not a matter of strict necessity, supposing that to be sufficient, as in the case of a wreck; but of necessity arising out of discretion and judgment. It was not made, because the captain thought that she could not be navigated after some repair, but that she

could not be beneficially navigated. It was his judgment, and which must now be taken to have been his *bonâ fide* judgment, upon the *expediency of a sale. But the thing was sold as a ship and not as a wreck; and immediately after, she was registered *de novo*; which shews what the true nature of the transaction was, and brings the inquiry back to the original question, Whether the master could, by his own authority, or by aid of the V.-A. Court, sell the ship, because he thought she could not be beneficially navigated any further: and if so, whether the property were legally transferred, without complying with the requisitions of the Register Acts? The power of sale in the captain is not proved by the clause in sea policies, empowering the captain, in case of misfortunes, to sue, labour, and travail, for the assured; for that is inserted in order to make the underwriters liable for expenses incurred in so doing. And as to *Milles v. Fletcher*, the sale was ratified by the owners, and being *bonâ fide*, it was held to bind the underwriters. The Register Acts have been held to extend to all sales of British ships by one British subject to another; and must of course include every sale by an agent, under whatever circumstances. Commissioners of bankrupt are not agents of the bankrupt in any sense of the word; but the property, which is vested in them by operation of law, is transferred by statutable authority. Supposing the owner went with his ship, but was not resident abroad, so as to fall within the precise words of the clause referred to; still he could not convey without complying with the requisite forms prescribed: so then must his agent. The only difference between sales abroad and at home is that in the former case the party has, by s. 17, a longer time allowed to complete the registry: but the agent cannot have a greater authority than his principal. In considering the question with relation to the Register Acts, the *Court cannot enter into any consideration of the motives which induced the sale of the ship. And as to the defendant's lien for salvage, that can only exist where the salvor acts for the benefit of the owners, and not on his own account, as here

REID
v.
DARBY
[*153]

[*156]

(LE BLANC, J.: If the sale be not lawful, the defendant has

REID
v.
DARBY.

converted the property by using it for his own benefit: for he shipped the homeward bound cargo on his own account, and brought it home.)

Lord ELLENBOROUGH, Ch. J. then stated with particularity the several points arising out of the case; and concluded with saying, that as some of them were of great and general importance to the mercantile world, and to the interests of the country, the Court would take them into mature consideration. And in this Term his Lordship delivered the opinion of the Bench.

[*157] (After stating the case)—The transfer of the property in the ship, upon which the defendant in this case relies, can only be supported on one of these two grounds, First, that of a valid sale under the decree and commission of the Vice-Admiralty Court of Tortola, where the sale took place; or, secondly, on the ground of an authority, either express or implied, derived from the owner to the captain, enabling him to sell the ship in such a case as has occurred. For the former, viz. that of a valid sale under the decree and commission of the Vice-Admiralty Court of Tortola; upon the fullest inquiry we have been able to make, we find no adequate foundation in the legitimate powers of the Admiralty Court. No instance has been discovered in which such a power has been exercised in the Admiralty Court at home: nor can we find any terms in the Vice-Admiralty *commission, or any principle upon which that practice can be sustained, (which certainly, however, has obtained in the Vice-Admiralty Courts abroad,) of decreeing, upon the mere petition of the captain, the sale of a ship reported upon survey to be unseaworthy, and not repairable, so as to carry the cargo to the place of its destination but at an expense exceeding the value of the ship when repaired. And in respect to the latter ground; in addition to the other cases cited in the argument, it is expressly laid down by Lord HOLT, in *Johnson v. Shippen*, 2 Ld. Ray. 984, that the master has no authority to sell any part of the ship, and that his sale transfers no property; but that he may hypothecate. But supposing that it could be fully made out in argument, that the captain was warranted by an adequate authority, express or implied, from his owner to sell the ship, in

the case of a necessity, like that which has occurred ; still, inas-
much as the ship specifically subsists, and is capable of being
used as such for purposes of navigation, and has in fact con-
tinued to be so used ; we are of opinion that it must be regarded
as an object of registration, under Lord Liverpool's Act, upon
any transfer thereof between party and party : and that the
forms required by the Registry Acts not having been in this case
complied with, the transfer in question is on that account void.
We feel ourselves, therefore, in a case where the sale is found to
have been *bonâ fide*, and made, as it should seem, for the actual,
as well as the intended, benefit, at the time, of all concerned, re-
luctantly obliged to pronounce it invalid : and that the plaintiff,
the original owner, still remains such for the purpose of this
action, and that therefore he is entitled to recover in this action.

BEID
v.
DABBY.

Postea to the plaintiff.

1808.
July 4.

ROE, ON THE DEMISE OF PRIDEAUX BRUNE, CLERK,
v. EDMUND PRIDEAUX AND OTHERS.

[158]

(10 East, 158—189.)

An estate, the greater part of which was in lease, either for years certain not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. be reserved." Held, 1st, that the power only authorized either a chattel lease, not exceeding twenty-one years, or a freehold lease not exceeding three lives; and that a lease by tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, and was not even good *pro tanto* for the twenty-one years.

But, the special verdict finding that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, and who had not given any notice to quit: held, 2ndly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a *venire de novo* was awarded. But the Court intimated that under the circumstances of the case, and the disparity of the rent reserved, being 4*l.* 2*s.*, while the rack-rent value was 60*l.* a year (though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4*l.* 2*s.* reserved was more than the ancient rent); a jury would be strongly advised to decide against a tenancy from year to year.†

In ejectment for lands in the parishes of Padstow, Little Petherick, and St. Issey, in the county of Cornwall, the lessor of the plaintiff laid one demise on the 1st of January, 1802, and another on the 1st of January, 1806; and at the trial a special verdict was found, setting forth, in the first place, indentures of lease and release of the 1st and 2nd of January, 1718, whereby Edmund Prideaux, the elder, conveyed to trustees his manors of Padstow and Hustyn, in Cornwall, the advowson of Padstow,

† Referred to in judgment of *Widlake* (1877) 3 C. P. D. 10, 15, 47 *BRAMWELL*, L. J., in *Smith v. L. J. Ch.* 282.—R. C.

and his capital messuage, farm, and demesne lands called Guardandria, and other lands specified, to certain uses therein mentioned; reserving to himself a power of revocation (except only as to the life-estate of Susannah his wife); and to limit other uses. Then by lease and release of the 15th and 16th of March, 1726, made after the death of his wife, Edmund Prideaux, the elder, conveyed other premises to the trustees, for the like uses, and with the like power of revocation. *Then, by indentures of the 18th and 19th of October, 1728, E. Prideaux, the elder, revoked the former uses, and in consideration of love and affection for his relation, Edmund Prideaux, the younger, and for settling and continuing the estates in the name, blood, and family of the Prideauxes, he limited the same to the trustees and their heirs, as to all the said manors and lands, &c. except Guardandria, to the use of himself for life; and as to Guardandria, to the use of E. P. the younger, for life; remainder to the use of himself for life; remainder, as to all the manors and lands, to the use of E. P. the younger, for life; remainder to Humphrey, the eldest son of E. P. the younger, for life; with remainder to his first and other sons in tail male in strict settlement; with like remainders to the second and other sons of E. P. the younger. Next followed a jointuring power to be exercised by Humphrey and the other sons of E. P. the younger, as they should respectively be seised of any of the said estates, except Guardandria. Then came the leasing power, on which the question turned. "Provided also that it shall and may be lawful for the said E. P. the elder and E. P. the younger, and for Humphrey Prideaux, (and the other sons, naming them, of E. P. the younger) and for all and every other person and persons, who by virtue of the limitations aforesaid shall be entitled to the freehold of the premises, or any part thereof, when and as he and they shall be in the actual possession of the same, or any part thereof, by virtue of the limitations hereinbefore contained, or any of them, from time to time, by indenture made under his or their hand and seal, hands and seals, to make grants, leases, or demises, of or for all or any part or parts of the demesne lands, whereof he or *they shall be in the actual possession as aforesaid, for any term or number of years, not exceeding one-and-twenty years, or for the

ROE dem.
BRUNE
v.
PRIDEAUX.

[*159]

[*160]

ROE dem.
BRUNE
v.
PRIDEAUX.

life or lives of any one, two, or three person or persons : so as no greater estate than for three lives be at any one time in being in any part of the premises ; and so as the ancient yearly rent, or a proportionable part thereof, be reserved." The special verdict then stated the deaths of Edmund Prideaux, the elder, on the 1st of December, 1728, and of Edmund Prideaux, the younger, on the 10th of June, 1745, and the seisin of Humphrey for life. That Humphrey had issue the lessor of the plaintiff, his eldest son, and also Humphrey, Mary, Edmund, Neville Richard, Nicholas, William, and Thomas, his other children. It then set out four several leases granted by Humphrey Prideaux, the tenant for life, and father of the lessor of the plaintiff, for the benefit of his younger children, under which the defendants, some of his younger children, claimed ; the validity of which leases under the power were now questioned. By the first of these, dated 13th of January, 1792, Humphrey, the father, for the advancement of his son Edmund, demised to T. Prater certain of the lands in settlement, reserving timber, mines, and stone quarries, &c. for the term of 99 years, if Edmund and Mary Prideaux, his son and daughter, or either of them, should so long live ; the said term to commence from and immediately after the death of Wm. Ball, or the surrender, forfeiture, or other sooner determination of a former estate in the said premises then determinable on his death ; in trust for the use of Humphrey, the father, for life, and then for Edmund, his son ; reserving an annual rent of 4*l.* 2*s.* clear of all rates, taxes, and reprises, and 5*l.* in lieu of a heriot, upon the respective deaths of *Edmund and Mary Prideaux, after the commencement of the term. The jurors then found that E. Prideaux, named in that lease, is yet living ; that the rent thereby reserved is more than the ancient yearly rent† of the demised premises ; and that at the time of granting the lease Wm. Ball was possessed of the same premises for the residue of a term of 99 years, determinable on the deaths of the said Wm. Ball and two others, which two others were then dead, under a former lease, dated 2nd of November, 1739, purporting, in the body of it, to be made between the first named Edmund Prideaux, the younger, Sir John Molesworth Bart. and

[*161]

† The ancient rent was in fact only 1*l.* 1*s.* 6*d.*

F. Gregor Esq. of the one part, and Christopher Ball of the other part; but in fact executed by Sir J. M. and F. G. (there recited to be the attornies of E. P. the younger,) in their own names only; without naming the said E. Prideaux in the execution. That Wm. Ball, the survivor of the lives therein named, died on the 25th of April, 1808; and that the premises thereby demised are now worth 60*l.* a-year, allowing rough timber, to be let at rack-rent. The special verdict then set out three other similar leases from Humphrey Prideaux, two of them dated the 13th of January, and the other on the 18th of June, 1792, for the advancement of others of his younger children; whereby he demised the residue of the premises for which this ejectment was brought, for 99 years, determinable on two lives; two of the terms to commence upon the death of one Elizabeth Millett, and the other on the death of one Samuel Trebilcock, or the surrender, forfeiture, or other sooner determination of a former estate in the same premises; which appeared to have *been granted in a similar manner and form by E. Prideaux, the younger, the father of Humphrey.

ROE dem.
BRUNE
v.
PRIDEAUX.

[*162]

The special verdict also set forth the particulars of those former leases, and it was urged in argument by the defendant's counsel that three at least of the four preceding leases were void on special grounds, at the time the leases of the 13th of January and 18th of June, 1792, were granted by Humphrey: but as the Court afterwards, in giving judgment on the case, declared that their opinion was formed wholly independent of those questions, it is unnecessary to state those particulars, or the arguments founded upon them. It was also stated that Elizabeth Millett, on whose death the second and third leases were to commence, did not die till the 21st of January, 1800; and that S. Trebilcock, on whose death the last lease was to commence, did not die till the 7th of March, 1799. That the annual rent reserved under the second lease of the 13th of January, 1792, was 12*s.* 6*d.* and a fat capon, &c. which was the ancient rent; but that the premises were now worth, at rack-rent, 35*l.* a-year. That the ancient annual rent of 13*s.* 4*d.* and a fat capon, &c. was reserved under the third lease; but the present rack-rent value was 17*l.* 10*s.* a-year. That 2*l.* 14*s.* 8*d.*, clear of taxes, &c. reserved yearly

ROE dem.
BRUNE
v.
PRIDEAUX.

under the fourth lease, was the ancient yearly rent of the premises; the improved rent of which is now 34*l.* a year.

[*163]

The special verdict then found that on the death of Trebilcock in 1799, Thomas Ball, one of the defendants, who had before married Mary Prideaux, named in the lease of 1792, entered and was possessed of the term thereby granted: and, on the 18th of January, 1800, was presented by the homage as tenant at the manor court of Padstow, and paid a fee on his admission. *That prior to and at the execution of the deed of settlement of the 19th of October, 1728, the greater part of the lands belonging to the manors of Padstow and Hustyn, and amongst others the premises in question, were out on leases, either for years certain, not exceeding 21, or for longer terms of years determinable on life or lives, and a very small proportion was in the occupation of E. Prideaux, the elder, (the settlor;) and that all the lives named in such leases, granted prior to that settlement, were extinct before the granting of the said leases of the same premises in 1792: and that all the leases, the indentures of which are now extant, (of which there are many,) which have been granted by any of the tenants of the freehold in possession since the deed of settlement have either been for a term of years certain, not exceeding 21 years, or for a longer term of years determinable on life or lives; and that there are no leases extant, granted by any such tenants, for the life or lives absolute of any persons whomsoever. That Humphrey Prideaux, the father, died on the 1st of May, 1795, on whose death the lessor of the plaintiff became seised of the premises comprised in the deed of settlement of 1728, and afterwards received the several rents of 4*l.* 2*s.*, 12*s.* 6*d.*, 13*s.* 4*d.*, and 2*l.* 4*s.* 8*d.*, reserved by the said four leases of 1792, up to Michaelmas, 1805, from the several tenants. That the lessor has not given to the several lessees, or to the occupiers under them, half a year's notice to quit the several premises; but that before the 1st of January, 1806, he did give notice to the parties claiming under each of the same leases, that he contended them to be void as against him. Upon these facts the jury referred the whole matter to the Court: and the case was argued in last Easter Term.

* * * * *

And in this Term

LORD ELLENBOROUGH, Ch. J., after stating the substance of the special verdict, delivered the opinion of the Court :

ROE dem.
BRUNE
v.
PRIDEAUX.
[184]

This verdict furnishes two questions ; the one, whether these four leases were warranted by the power ; and the other, whether a notice to quit was in this case necessary. Two objections have been made to the leases ; one, that they were to commence *in futuro*, and therefore such as the power did not warrant ; the other, that the power did not authorise any lease for years which might by possibility exceed 21 ; and if we are of opinion that the latter is a valid objection, it is unnecessary to say anything upon the former. The power authorizes the grant of either a chattel, or a freehold lease ; the former not to exceed 21 years, nor the latter three lives : it is in the alternative to grant either the one, or the other, but not both ; so that the same premises cannot at any one time be under leases both for years and lives. It was held in *Elmer's* case, 5 Co. Rep. 2, and *Marler v. Wright*, Moor, 253, 4, that under the stat. 5 Eliz. c. 19, s. 5, which vacates all bishop's leases, except such as are for 21 years or 3 lives, the same premises cannot be under leases for years and lives at the same time : and it should seem equally objectionable under such a power as this. If this be so, it may make an essential difference to the reversioner or remainder-man, whether the premises are let for three lives, or for 99 years determinable upon three lives. A chattel lease may be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the subsisting lease ; but so *long as there is a freehold lease *in esse*, a second freehold lease cannot be granted. The right of granting a second chattel lease was settled in *Read v. Nash*, 1 Leon. 148, and is recognized as law in *Goodtitle v. Funucan*, Dougl. 3 Ed. 572 : but a second freehold lease cannot be granted, because it must be to take effect *in futuro*, and a freehold cannot be conveyed unless it is to take effect *in presenti*. 2 Wils. 166. If a lease therefore were granted for lives, no further lease could be granted till that lease were determined ; not a chattel lease, because the power does not admit of the same premises

[*185]

ROE dem.
BRUNE
v.
PRIDEAUX.

[*186]

being under a chattel and a freehold lease at the same time ; nor a freehold lease, because that would be to commence *in futuro* : whereas, if there were a chattel lease for 99 years determinable upon three lives, and one of those lives were to drop, a second chattel lease for a new life, in addition to the other two, might be granted during the continuance of the first. Whenever a life therefore dropped, there would be this essential difference between a freehold and a chattel lease, that, upon the former, no new life could be added, unless the termor would surrender the first lease ; whereas, upon the latter, a new life might be added without any such surrender. In the one case, therefore, an important advantage would accrue to the reversioner or remainder-man, if the tenant for life and the person entitled to the first lease could not agree upon a surrender ; in the latter, such advantage would be wholly lost. Attending, therefore, to this material difference between the two descriptions of leases, can the Court say that when the power uses terms applicable to one of them, the party is entitled at his option to grant the other ? Can the Court say that the person who created this power had not this difference in contemplation, *and did not intend the reversioner or remainder-man should have the advantage which might result from confining the tenant for life to that species of lease which the power expressly mentions ? In *Whitlock's case*, 8 Co. Rep. 69 b, this very point was conceded by the whole Court ; and if that case be law, the question here is at an end. In that case there was a general power to make leases, so as they did not exceed three lives or 21 years ; and under that, a lease for 99 years determinable upon 3 lives was adjudged good ; because the only restriction in the power was that the lease should not exceed 3 lives or 21 years ; and a lease for 99 years determinable upon three lives is a lease not exceeding three lives. But a difference was taken between a general power, not specifying the kind of lease, but adding a restriction to limit the extent of the leases ; and a power particularizing the species of lease to be granted : and it was said that “ if one hath power to make a lease for three lives, he cannot make one for 99 years determinable upon three lives ; *quod fuit concessum per totam curiam.*” This position, though not the point decided, is adopted by Lord

ROLLE, in his Abridgment, vol. 2, p. 260, pl. 3, and by DODDRIDGE, J. in Sheph. Touch. 269. In *Rattle v. Popham*, 2 Str. 992, it was adjudged by Lord HARDWICKE and the other Judges of B. R. that a power to limit an estate to a wife for life did not, at law, authorize the granting her an estate for years determinable upon her death; and, according to the report of this case by the late Mr. Ford, the Court recognized the distinction laid down in *Whitlock's* case between such powers as particularise the species of leases to be granted, and such as do not. It is true that after the decision in *Rattle v. Popham* in K. B. Lord *TALBOT supported that lease in equity; and in 2 Burr. 1147, Lord MANSFIELD throws some discredit both upon *Whitlock's* case and *Rattle v. Popham*: but in *Shannon v. Breadstreet*, Reports temp. Lord Redesdale, 66 to 71, Lord MANSFIELD'S observations are canvassed by Lord REDESDALE, and the determination in *Rattle v. Popham* is approved of by him. And after full knowledge of what Lord TALBOT had done after the decision in *Rattle v. Popham*, Sir THOMAS CLARKE when sitting for Lord Hardwicke appears to have considered that decision right. In *Alexander v. Alexander*, 2 Ves. Sen. 644, he says "Suppose one has power to jointure a wife for life, and appoint to her for 99 years if she so long live; as in the case of Mr. Newport; at law it was held in B. R. to be void, but in equity good *pro tanto*." It is therefore our opinion both upon principles and upon authorities, that as this power authorised leases for 21 years or three lives only, the leases in question, which are for 99 years determinable upon three lives, are not warranted by it. It was argued that the leases if not good for the 99 years, might still be good for 21 years should any of the lives so long continue; but it is sufficient to say that no authority was cited to shew that a court of law has ever held itself entitled to consider such a lease as good in part.

Upon the 2nd question, Whether a notice to quit were in this case essential, we are afraid the special verdict does not enable us to decide the point. The receipt of rent is evidence to be left to a jury that a tenancy was subsisting during the period for which that rent was paid; and if no other tenancy appear, the presumption is that that tenancy was from year to year: and if there were a tenancy, it is not for the Court to say, whether it be

ROE dem.
BRUNE
v.
PRIDEAUX.

[*187]

ROE dem.
BRUNE
v.
PRIDEAUX.
[*188]

continuing or ending. In *Roe v. Ward*, 1 H. Black. 97,† where tenant for life made a lease, and *died, and the remainder-man received rent from the lessee for two years; the payment on the one hand, and the receipt on the other, were considered as evidence of an agreement for a tenancy from year to year upon the terms contained in the lease. And in *Doe v. Watts*, 7 T. R. 83,‡ where tenant for life made a lease not warranted by his power, and the remainder-man received the rent reserved by it, this Court held this receipt evidence of a tenancy from year to year between the lessee and the remainder-man; notwithstanding a case of *Goodtitle v. Prentice*,§ in which GOULD, J. ruled the contrary: and the plaintiff having been nonsuited for want of a notice to quit, the nonsuit was confirmed. It has been argued that the great disproportion between the rents reserved, and the real value, will enable us to say that the receipt of the rents did not create a tenancy from year to year; and *Right v. Bawden*, 3 East, 260, has been cited to satisfy us it did not. In *Right v. Bawden*, however, there was no proof that the lord knew of the payment; for it was made to his lessee; and that was a special case, not a special verdict: and as it was obvious the jury must have been directed to draw a conclusion against a tenancy from year to year, the payment being made with reference to a supposed tenancy of another kind, the Court might not think it necessary to send the case back to have that conclusion drawn. This is a special verdict, upon which if what the jury has found be evidence, and sufficiently material not to be rejected as surplusage, the Court cannot draw the conclusion of fact which is to result therefrom, however palpable it may be what that conclusion ought to be. As to the disproportion between the rent and the value, the verdict does not enable us to say what that disproportion was during the *period for which the rent was received, because it only finds what was the value at the time of the verdict: but if the disproportion at the time for which the rent was received were ever so clearly ascertained, we could not act upon it, because it would only furnish ground to induce a jury to decide against a tenancy. The receipt of the

† 2 R. R. 728.

§ Cited in *Doe v. Watts*, 7 T. R. 84.

‡ 4 R. R. 387.

[*189]

rent is some evidence of a tenancy; upon that evidence it is peculiarly the province of the jury to decide; and though they would probably receive a very strong direction to decide against a tenancy, yet they only can decide it: and unless the defendants, therefore, will consent to strike out from the special verdict every fact which can be deemed any evidence of a tenancy from year to year, we are of opinion there must be a *renire de novo*.

ROE dem.
BRUNE
v.
PRIDEAUX.

BOURNE v. TAYLOR.†

(10 East, 189—205.)

1808.

July 4.

[189]

The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing.

But where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c. it is not enough for the plaintiff to reply that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demisable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the liberty of working the mines: because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it.

TRESPASS for breaking and entering the plaintiff's close, part of the North Farm, otherwise the Lowstead Farm, and another close, part of the Town Farm, in the township of Backworth, in the county of Northumberland, and subverting the soil, and digging and boring the same, &c. The defendant pleaded the general issue and six special justifications of the trespasses, as servants, and by command of the Duke of Northumberland. The first of these stated that the Duke, at the times when, &c. was and is seised in fee *of the manor of Tynemouth, with the appurtenances, in the said county, of which the closes in question have immemorially been parcel and copyhold tenements of the manor: and that by reason thereof the Duke was entitled to

[*190]

† *Eardley v. Granville* (1876) 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. 609.

BOURNE
 v.
 TAYLOR.

all mines and veins of coal in and under the same closes, &c. and to bore for, dig for, and get such mines and veins of coal. The 2nd justification stated the same right in the Duke, he making and allowing to the copyhold tenants of the said closes in which, &c. and their tenants and occupiers thereof respectively a reasonable satisfaction and compensation for all damages done or occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. The 3rd stated that the places in which, &c. from time immemorial have been parcel of the said manor; and that the Duke is seised in fee of and in the veins and seams of coal lying within and under the copyhold tenements within and parcel of the same manor, together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all such acts as might or may be necessary for those purposes, or any of them. The 4th stated the same right in the Duke as the 3rd, he making and allowing to the said copyhold tenants, &c. (as stated in the 2nd justification) reasonable satisfaction and compensation for all damages occasioned to them respectively by the boring for, digging for, and getting the said coals, and the doing such necessary acts as aforesaid. The 5th and 6th justifications were like the 3rd and 4th, with the additional allegation that the Duke was also seised in fee of the manor of Tynemouth.

[*191]

The plaintiff demurred specially to the first and second justifications, because they do not allege as a fact that the Duke was entitled to bore for, dig for, and get the *coal within or under the copyhold tenements of the manor, but alleges that he was so entitled as a consequence of law, arising from the fact of his being seised in fee of the manor: and because those pleas do not shew how the Duke's supposed right to bore for, dig for, and get the same coal, or to enter and dig in the close, &c. for that purpose, arose; whether by custom, prescription, grant, or how otherwise. And to the other justifications the plaintiff severally replied that as well all the said veins and seams of coal within and under the same close in which, &c. as the rest of the soil and ground of and within and under the same, from time immemorial have been parcel of the manor, and demised and demisable by copy of court-roll, &c. without any exception or reserva-

tion thereout or therefrom of the mines or seams of coal within or under the said closes in which, &c. or either of them or any part thereof. That before the said Duke was so seised of the said manor, the late Duke was lord of the same, and seised thereof, and at a court baron, &c. granted the said closes in which, &c. to Sir Mathew White Ridley Bart. and Charles Brandling Esq. to hold to them and their heirs at the will of the lord, &c. and the survivor of them demised to the plaintiff, &c. The defendant demurred specially to these replications to the pleas, because they do not directly traverse, nor confess and avoid, the matters of the said pleas, and are argumentative and not issuable. The case was argued in the last term.

BOURNE
v.
TAYLOR.

Holroyd for the plaintiff :

The principal question is, Whether, without any special custom, or special reservation of the mines, the lord has a right to enter upon the copyholder's land and dig for coals there, either *with or without making him compensation for the injury done to the surface. The defendant by his pleas admits the lands to be copyhold ; and the plaintiff by his replications to some of them alleges that they have been immemorially demisable by copy, without any reservation of the mines of coal. Where there is a grant of the land itself, all above and below the surface passes with it,† unless specially reserved. This indeed is not the nature of the copyholder's estate ; for without a special custom he cannot dig the mines under his copyhold ; nor can he cut trees, except for special purposes, as for repairs, or toppings and loppings for fire-bote ; because, not having the freehold of inheritance in him, it would be waste. If the mines were reserved out of the grant, though no waste could be committed of them, the tenant digging for them would be a trespasser. But where any estate or interest in land is granted, the lessee or grantee takes not only the surface, but all above and below it ; and no other can break the soil, without committing a trespass upon the tenant's possession. If mines were opened before, the tenant may dig and take the profit thereof ; which shews that the mines themselves are granted, though it

[*192]

† 1 Blac. Com. 18.

BOURNE
v.
TAYLOR.

be waste in him to dig for any new mine, without licence.† Where the mines are expressly reserved to the lord, that may be an implied reservation of his right to enter and dig for them : but without such express reservation, or a custom reserving the right to the lord, which is equivalent, it would be derogatory to his grant to enter and dig where he has granted the land generally. The copyholder is clearly entitled to all the profits of the soil, of part of which he must be deprived, *if the lord may enter upon and dig the soil for coal, which cannot be procured without a great destruction of the surface about the opening of the mine. The lord, therefore, having parted with the right of possession to the whole during the time of the grant, must necessarily be a trespasser if he enter upon the copyhold. The general rule is, that every grant is to be taken most strongly against the grantor, within the words of it. With respect to the particular case of copyholds, in *The Earl of Kent v. Walters*,; Northey having contended that by the general custom of copyholds the lord might cut trees on them, for otherwise, if it were a copyhold in fee, the wood would never be cut, which would be inconvenient ; Lord HOLT denied the lord's right ; and said that the copyholder had the same interest in the trees that he had in the land. And in *Ashmead v. Ranger*§ this Court held that trespass lay against the lord for entering and cutting down trees on the copyhold ; Lord HOLT again affirming his former opinion, that the tenant had the same customary or possessory interest in the trees that he had in the land : and adding, that if the lord had a mind to cut trees, he must compound with the tenant. This judgment was affirmed in the Exchequer-Chamber by all the Judges : but it appears|| to have been afterwards reversed in the House of Lords by 11 against 10 ; because the tenant could not cut the trees, and if the lord could not, they must rot on the land ; for then nobody could. At most that judgment can only conclude that particular case. That mines pass by the general grant of an estate appears from *Clavering v. Clavering*,¶ *where tenant for life amenable for

[*193]

[*194]

† *Saunders's case*, 5 Co. Rep. 12 ; *Ld. Ray.* 552.

Co. Lit. 54 b.

‡ 12 Mod. 317.

§ *Ib.* 378 ; *Com. Rep.* 71, and 1

|| 11 Mod. 18, and *Salk.* 638.

¶ 2 P. Wms. 388.

waste was held entitled to open new shafts for the further working of an old vein of coal. But the point now in judgment seems to have been decided in *Player v. Roberts*,† where the case is put that a man grants the coal and coal mines within a manor, parcel of which was copyhold, held for life, to J. S. : the lessee (stated by mistake for the lessor) enters on the copyhold, and digs a new pit there, during the life of the copyholder, and takes the coals and converts them to his own use ; and the lessee of the coal mine brought trover against the lessor : and held that he might ; for neither the lessee, nor the lessor, could enter on the copyholder to dig the coals ; for the copyholder shall have trespass for breaking his close and digging of the coals : but, that when the coals were dug out of the pits by the lessor, or lessee, or by a stranger, they belonged to the lessee, who should have trover against any one who took them. In *Lyddal v. Weston*,‡ upon a question whether the plaintiff could make a good title, Lord HARDWICKE, C. said that there was no instance where the Crown had only a bare reservation of royal mines, without any right of entry, that it could grant a licence to any person to come upon another man's estate, and dig up his soil and search for mines ; and he thought that the Crown had no such power. But when the mines were once opened, the Crown may restrain the owner of the soil from working them, and may work them on its own account, or grant a licence to others to do so. In *The Bishop of Winchester v. Knight*,§ the facts were that a customary tenant holding under the bishop had opened a copper mine where none had been before, and dug out *and sold great quantities of ore, and after his death his heir had continued to dig for and dispose of other copper ore. The bishop filed his bill against the executor and heir for an account. Lord Chancellor COWPER considered that the executor would be liable, if the tenant had no right ; but this being a question at law, and doubtful upon the evidence before him, he directed an action of trover to be brought by the bishop against the then tenant ; which the report states was tried : and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might

BOURNE
v.
TAYLOR.

[*195]

† W. Jones, 244.

‡ 2 Atk. 20.

§ 1 P. Wms. 406.

BOURNE
v.
TAYLOR.

by custom dig and open new copper mines. So that upon the producing of the postea, the Court held that neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, could dig in these copper mines, being new. And, lastly, in the case of *Grey v. The Duke of Northumberland*,† LORD CHANCELLOR restrained the lord of the manor from opening a mine, which he was preparing to do, upon the plaintiff's copyhold land.

The question upon the pleadings was also discussed by the counsel on both sides; but it is sufficient to refer to the opinion of the Court upon this point.

Hullock, contra:

[*196]

It is admitted that the freehold is in the lord, and that he has a right to all mines under the surface of the copyhold; and that when severed and taken by any other, the property is in the lord, and he may recover it in trover. The question then is, whether having a clear right of property in the subject matter, he has not, necessarily incident to that right, the power of *taking it. A copyholder, in the origin of the tenure, was a mere tenant at will; and at this day can derive no other rights to his estate than what have in fact been exercised from all time, and which are therefore given to him by the custom of the manor. In every instance of the exercise of a right of property over his estate, it lies upon him to shew a custom for what he claims; and whatever he cannot claim by custom remains in the lord, whose rights are reserved to him by the common law, and are not dependent on the custom. The lord might originally have granted the copyhold with what reservations he pleased; and it must be presumed that he reserved every part of the copyhold which the custom does not shew that he granted to the copyholder, with all the powers incident to the enjoyment of such reservation.

(Lord ELLENBOROUGH, Ch. J.: In the absence of all other evidence of the grant than the custom, does not the absence of any custom either for the lord or the copyholder to open mines shew what the terms of the grant were?)

† 13 Ves. 236.

BOURNE
v.
TAYLOR.

The origin and nature of this kind of estate must be attended to. The copyholder's estate has grown out of encroachments on the lord. Even at this day the grant does not operate as a common law grant would. Nothing passes by it but the mere use of the surface of the soil: the trees and mines still remain in the lord, in whom is the freehold of the whole. The lord's rights must either be taken to have been reserved out of the original grant, if any, or to be excepted by the common law; for certainly they are not derived from the custom. In *Folkard v. Hemmett* and others,† where, in case by a commoner *against a stranger for digging the soil and erecting buildings on the common, the defendant justified under a grant of the soil by the lord with the consent of the homage according to the custom; Lord C. J. DE GREY, after hearing evidence of similar grants by the lord for a long period back, said he would not call it a custom, but a usage; because he considered it as a reserved right of the lord; and that it was legal. If mines be expressly reserved to the lord in a grant, the law would reserve his right of entry and digging there, as incident to such reservation. And the legal effect of an exception or reservation by the law cannot be less beneficial than if it were by act of the party. The lord's right, however, is rather an exception, which as Lord Coke ‡ says is ever of part of the thing granted and of a thing in esse, than a reservation, which is always of a thing newly created or reserved out of the land demised. Then the law excepts every thing which is incident to the enjoyment of the thing excepted; and when it gives any thing to one, it gives impliedly whatsoever is necessary for the taking and enjoying the same.§ If trees be excepted in a lease, the law gives the lessor and those who would buy of him power to enter and shew the trees. So it gives power to him who has a conduit in the land of another to enter and mend it when needful. *Liford's* case.|| In the case of mines,¶ it was held by all the Judges, that the King, having by his prerogative a right to all gold and

[*197]

† Sittings after Easter, 16 Geo. III. C. B. 5 T. R. 417, note.

‡ Co. Lit. 47 a.

§ 2 Inst. 306; Co. Lit. 56 a, and Finch's Law, 63.

|| 11 Co. Rep. 52, and Perk, s. 111, and vide *Hodgson v. Field*, 8 R. R. 701 (7 East, 613).

¶ Plowd. 313, 323, 336.

BOURNE
v.
TAYLOR.
[*198]

silver mines throughout the realm, and also the liberty to dig and lay the same upon the land of the subject, and carry it away from *thence: which is directly against what is said by Lord HARDWICKE in *Lyddal v. Weston*.† If one have a right of way over another's land, he may enter to repair it.‡ If this right of the lord affect the copyholder's enjoyment, it is because of the nature of his tenure: and though every grant is to be construed most strongly against the grantor, that only applies to that which is meant to pass, but not to an interest, which it is admitted did not pass. The case of *Player v. Roberts*,§ was a question of property between the lord and the lessee of the coal mine, concerning coal severed from the mine; and no doubt the property when raised was in the lessee, whether rightly dug or not; and therefore all that was said in respect of the right to dig was beside the point in judgment. But the final determination of the lords in *Ashmead v. Ranger*,|| is a direct authority upon principle to govern this case. The cases of trees and of mines are in every respect analogous. The right to both when severed is in the lord; with the exception of such trees as the tenant is entitled to take for repairs. Then if the lord were adjudged to have a right to come upon the land, and cut down and take the timber as incident to his right to it when standing; by the same rule he must have an equal right to take the coal or metals under the surface in the only way in which they can be gotten, by digging for them. The judgment of the Lords there was conformable to the opinion delivered in *Heydon v. Smith*; ¶ where in trespass by a copyholder against the lord's bailiff for entering his close and cutting down a timber tree; the fourth resolution was, that the lord cannot take all *the timber trees; but he ought to leave sufficient for the reparation of the customary houses, &c. And in the report of the same case in *Godbolt*, Lord Coke says, that "without any custom the lord may take the trees, if he leave sufficient to the copyholder for the reparations." There are also other authorities to that effect.††

[*199]

† 2 Atk. 20.

‡ Finch's Law, 63.

§ W. Jones, 244.

|| Salk. 638, and 11 Mod. 18.

¶ 13 Co. Rep. 67; Brownl. 328,

and Godb. 172.

†† 1 Leon. 272, case 365; *Ayray v. Bellingham*, Finch's Rep. 199; 2 Brownl. 200.

In the case of *The Countess of Rutland v. Gie*,† the Court denied a prohibition to restrain a rector from digging for lead in his glebe; saying, that if he could not dig mines in his glebe, all the mines under all the glebes in England must remain unopened. And TWISDEN, J. thought that the lord might open a mine in a copyhold of inheritance; though FOSTER and KEELING, Js. thought that he could not. Upon the whole, there is no decided case against the lord, and all legal analogies and principles are with him; for it is absurd and against public policy, that the owners of so great a mass of property should be precluded by law from the enjoyment of it.

BOURNE
v.
TAYLOR.

Holroyd, in reply, upon the general question, said that if a mine, lime pit, or stone quarry, were once lawfully opened upon the copyhold, the copyholder may dig and enjoy it; which shewed that an interest passed to him in the land beyond the mere use of the surface. It is also shewn by this, that if the copyholder himself open a new mine, it is waste in him; whereas if no interest passed to him in it, it would be a trespass, and not waste; and therefore not a forfeiture of the copyhold. Even as to trees, it is said in the 5th resolution of *Heydon v. Smith*,‡ that the copyholder may maintain trespass against the *lord, for breaking and entering his close, and cutting *arborem suam*. And in *Folkard v. Hemmett*, the lord's right was claimed and supported by usage; which was evidence of an express reservation in the original grant of the right of common.

[*200]

Curia adv. vult.

LORD ELLENBOROUGH, Ch. J. :

This was an action of trespass. The defendant pleaded six justifications. The first stated that the Duke of Northumberland is seized in fee of the manor of Tynemouth; that the places in which &c. have immemorially been copyhold tenements of that manor; and that by reason thereof the Duke is entitled to all mines and veins of coal, in and under the said closes in which &c. and to bore for, dig for, and get such mines and veins of

† 1 Sid. 152; 1 Lev. 107, and 1 † 13 Co. Rep. 68, 9.
Keb. 557.

BOURNE
v.
TAYLOR.

coal. The second justification states that the Duke had the right above-mentioned, making and allowing to the copyhold tenants of the said closes in which &c. and their tenants and occupiers thereof respectively, a reasonable satisfaction and compensation for all damages done or occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. To these two first justifications the plaintiff has demurred, and has assigned for cause, that the existence of the right (so claimed as aforesaid) is alleged, not as a fact, but as a consequence of law from the Duke's being seized of the manor. The third justification states that the places in which &c. from time whereof &c. have been copyhold tenements of the manor of Tynemouth; and that the Duke is seized in fee of all the veins and seams of coal lying within and under the copyhold tenements of the manor together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all acts necessary for those purposes; and justifies under that right. *The fourth is the same with the third, except that it adds that compensation is to be made for damages, as the second does. The 5th and 6th are like the 3rd and 4th; but they add that the Duke is also seized of the manor. To each of these four last justifications the plaintiff has replied, that as well the said veins and seams of coals lying under the said closes in which &c., as the rest of the soil and ground of and within and under the said closes in which &c. from time immemorial have been parcel of the said manor, and demised and demiseable by copy of court roll, without any exception or reservation of the mines or seams of coal within or under the said closes, in which &c. or either of them, or any part thereof; that the said closes in which &c. were granted to Sir M. White Ridley and Charles Brandling, Esq. to hold to them and their heirs, at the will of the lord &c. and that they demised them to the plaintiff. To each of these replications the defendant has demurred, and has assigned for cause, that they do not directly traverse, or confess and avoid, any of the matters contained in the pleas, and are argumentative, and not issuable.

Upon these pleadings, therefore, there are two questions; the one, a general one, whether the lord of a manor has, as lord, a

[*201]

right to enter upon the copyholds within the manor, if there be mines and veins of coals under them, and bore for and work such mines or veins? the other, a question of mere form, whether the replication to the last four justifications sufficiently confess and avoid them; or whether they ought not to have traversed the liberty of digging stated in the justifications.

BOURNE
v.
TAYLOR.

As to the first, if such a right as is claimed exist, it is singular that it is not noticed in any of the books which treat of manors and copyholds; that it is now for the first *time brought forward; that not a single instance is given of the exercise of it; and that with the single exception of a dictum in *Rutland v. Greene*, what authorities there are upon the point are all against it. *Rutland v. Greene* is in 1 Keb. 557, 1 Sid. 152, and 1 Lev. 107. The case was this; a parson opened a mine upon his glebe: the patron moved for a prohibition to restrain him under the equity of the statute, 35 Ed. I. st. 2. The Court thought him entitled to open and work the mine; because, otherwise, none of the mines under glebe lands throughout England would be opened. But it being urged that this was the only way the patron had to try his right, the Court granted a rule. Siderfin adds, "the same law seems of a copyholder of inheritance. *Quere bien*." Whether this were his own conclusion, or collected from what fell from the Court, does not appear: but if any inference is to be drawn from it, it is, that the copyholder may open the mine, not the lord. Levinz says nothing as to lord or copyholder: but Keeble says, "TWISDEN conceived the lord may open a mine in a copyhold of inheritance." FOSTER held it a trespass; and KEELING conceived he could not do it. The utmost extent therefore of this authority is, that there is the *obiter dictum* of one Judge, viz. TWISDEN, against the *obiter dicta* of two others, FOSTER and KEELING. In *The Bishop of Winton v. Knight*, 1 P. Wms. 406, Lord Chancellor COWPER held, that if there were no custom to regulate it, neither a customary tenant, without licence from the lord, nor the lord without licence from the tenant, could open and work new mines. In that case a customary tenant of the manor had opened a copper mine, and the lord filed a bill against him to account for the produce. It being doubtful where there was not a

[*202 ;

BOURNE
v.
TAYLOR.
[*203]

custom which would protect the tenant, the *Lord Chancellor directed the lord to bring an action of trover: but the custom appearing upon the trial not to be applicable, “the Court held, that neither the tenant, without the licence of the lord, nor the lord, without the consent of the tenant, could dig in these mines, being new mines.” In *Player v. Roberts*, Sir W. Jones, 243, J. N. was copyholder for life: the lord granted all coal mines within his manor for 99 years to Dimery, who underlet to Player: Dimery’s term was afterwards surrendered to the lord, but Player’s interest was not extinguished: the lord opened new pits upon the copyhold, and took away the coal; upon which Player brought trover against him. Several points were moved; and the last was this: a man grants all his coal and coal mines within a manor, (and parcel was copyhold for life,) to J. S.: the lessee (this should be the lessor) enters the copyhold, and digs a new pit in the copyhold land during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brings trover against the lessor: and, by the Court, so he may; for it is true, that neither the lessee nor the lessor can enter upon the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close, and digging his coals. But when the lessor or lessee or a stranger enters, and digs the coals out of the pits, they belong to the lessee; and if any other take the coals, the lessee shall have trover: and upon the whole matter judgment was given for the plaintiff. In *Gilb. Ten.* 327, the Lord Chief Baron says, “It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines: neither can the lord dig in the copyholder’s lands, for the great prejudice he would do to the copyhold estate.” Lastly, In *Townly v. Gibson*, 2 T. R. 704—707,† it had been *urged in argument that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him: and BULLER, J. in delivering his opinion, said, “I do not agree with the defendant’s counsel that the lord may, unless restrained by custom, dig for mines on the copyholder’s lands: but it is not necessary to consider that question here.” These authorities

[*204]

BOURNE
v.
TAYLOR.

are in point; and though they are dicta only, not decisions, they are the dicta of great men, and they correspond with the usage on the subject. Valuable as the supposed right is, there is not a single instance shewn in which any lord has ventured to act upon it. The injury to the tenant would naturally have produced resistance on his part: the dicta above-mentioned would have encouraged that resistance: a suit would have been the consequence, and the result of such suit must have been known in Westminster-hall: and as none such is known, it may fairly be presumed that a litigation of that kind has not taken place.

The second question, whether the replications ought to have traversed the liberty of working the mines, as stated in the 3rd and subsequent justifications, depends upon the construction to be put upon those justifications. If they mean only, that the liberty is so annexed to the seisin in fee, as that, until the right of actual possession has accrued in virtue of the seisin, the liberty cannot be exercised; the replications have sufficiently confessed and avoided it by shewing that there is an outstanding copyhold estate, which suspends the right of actual possession. But if the pleas are to be considered as claiming the liberty presently, *i.e.* during the continuance of the copyhold estate; that liberty is not confessed and avoided by the replications, and there ought to have been a traverse. The latter seems to be the true meaning of these pleas: and indeed the pleas *would be bad if it were not; for they admit that the closes in which, &c. were copyhold tenements at the time of the trespasses, and insist upon the right to enter upon the copyholds. The defendant says, all the mines under the copyholds are the Duke's, and the Duke has a right to work them: the closes in question were subsisting copyholds at the time of the trespass, and therefore I entered under the Duke's right. The defendant therefore must have meant that the Duke's right was such as entitled him to work during the copyholder's estate. The word liberty too implies the same thing. It imports, *ex vi termini*, that it is a privilege to be exercised over another man's estate. A man's right of dominion over his own estate is never called a liberty. Now during the continuance of the copyhold, if the mine is to be worked, the lord must exercise a privilege over the copy-

[*205]

BOURNE
v.
TAYLOR.

holder's estate; but as soon as the copyhold is at an end, the surface will be the lord's as well as the coal, and he will have to work upon nothing but his own property. It requires then no reasoning to prove, that if the pleas claim the liberty during the continuance of the copyholder's estate, a replication that the copyholds have always been demised, without any exception or reservation of the mines or seams of coal, is not a confession of the liberty and an avoidance of it, but a mere argumentative denial of its existence; and as this is assigned specially as a cause of demurrer, it should seem that the replications are bad on this ground, and that the plaintiff ought to have leave to amend, or that there should be judgment for the defendant.

The plaintiff's counsel then prayed leave to amend his replications; which was granted.

1808.
July 4.

[206]

DOE, ON THE SEVERAL DEMISES OF WEBBER, AND
THE DEAN AND CHAPTER OF EXETER, v. LORD
GEORGE THYNNE AND OTHERS.

(10 East, 206—210.)

Upon a question whether the entries, from 1586 to 1693, in certain ancient books, preserved in the archives of the Dean and Chapter of Exeter, intituled Rentals, and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different handwritings against such rents, were entries made by the receivers of the Dean and Chapter charging themselves with the receipt of the rents, parol evidence cannot be received to prove the books to be receivers' books, by shewing that the receivers of the Dean and Chapter for the last sixty years had kept their books of accounts in the same form. But it appearing that some of the entries in such books (though not the entries as to the rent of the estate in question), contained internal evidence of their being the books of receivers; by such entries as "*solvit mihi*," and "*solvit per me*;" signed with the initials N. W.; which entries imported that N. W. was therein accounting to the Dean and Chapter for money paid to himself, and with the receipt of which he debited himself:—the Court directed a new trial, in order to have the inspection of the books again submitted to the Judge at Nisi Prius.

At the trial of this ejectment for premises, called the Denn, in East Teignmouth, in the county of Devon, before Thomson, B., the title was stated to be either in Webber under a purchase

from the Dean and Chapter of Exeter in pursuance of the Land-tax Redemption Act, or remaining in the Dean and Chapter. And in order to prove that the Dean and Chapter were in possession of the Denn, several ancient books, denominated on the outside Rentals, were produced from amongst the muniments of the Dean and Chapter out of their archives; some of them subsequent to the disabling statute of the 13 Eliz. c. 10, which appeared to contain entries of rent from time to time received by the Dean and Chapter in respect of the Denn. But it did not appear to the learned Judge that any of the books subsequent to that period purported to be the accounts of receivers charging themselves with these rents. The present receiver of the Dean and Chapter was then called on the part of the plaintiff to prove that he had held that office from 1808, and to produce his books, in order to shew, that he kept his accounts as receiver in the same form in which the entries in the old books were made: which evidence the learned Judge thought inadmissible *to explain the ancient books, and therefore nonsuited the plaintiff.

DOE
v.
LORD GEO.
THYNNE.

[*207]

A new trial was moved for in the last term, when the general form of the entries was stated to be, so much due as rent for the Denn, (amongst other descriptions of property) and afterwards in a different hand-writing *solvit*, with a date, and in some instances *solvit in scaccario*; from which the lessors of the plaintiff wish to have inferred that it was the entry of the receiver charging himself; contending that the practice in modern times, as far back as living memory went, of keeping the books by the receivers of the Dean and Chapter, who had charged themselves in the same form, strengthened that inference. But at this distance of time it could not be told by whom those entries were made; and the books it was admitted came out of the possession of the Dean and Chapter; having been kept in their treasury, to which the receivers, it was said, had access. And in answer to a question by the Court as to the respective dates of the earliest and latest entries respecting the Denn in these books entitled Rentals; and how far back from the present time there was living evidence of the books having been kept in the same form by the receivers; it was answered, that the earliest date respecting the Denn was 1586, and the latest in

DOE
v.
LORD GEO.
THYNNE.

1698; and that there was evidence of the modern receivers having kept their books in the same form from 1746 to 1803.

[After argument:]

[209] The COURT desired to have an inspection of the books themselves, from whence they were called upon to infer the character of the persons by whom the entries were made: and the case stood over for further examination of them till the end of the term, when

LORD ELLENBOROUGH, Ch. J. said:

[210] The motion for a new trial in this case has been made on the ground of the refusal of the Judge to receive in evidence certain comparatively modern receivers' books, in order to lay a foundation for presuming, from a comparison between the two, that certain other ancient books, kept in the same manner, and containing like entries of receipts and payments, were also receivers' books, and entitled to be read in evidence as such. We are of opinion, that the similitude which appears upon the entries to exist between the ancient and modern books does not lay a safe and adequate ground for presuming that, because the later books are known and can be proved to have been kept by receivers of the Dean and Chapter of Exeter, and accounted upon as such, therefore the former books were kept by persons of the same description and character, and made and used for the like purpose. We therefore cannot grant a new trial for the rejection of the evidence offered for this purpose, upon the ground on which it has been prayed. But inasmuch as upon inspection of the original ancient books, we think they do contain very strong internal evidence of their actually being receivers' books; the language of several entries importing that one Nicholas Webber was therein accounting to the Dean and Chapter for money paid to himself, and with the receipt of which he therein debits himself; such as "*solvit mihi*," "*solvit per me*." We are of opinion that it is fit that a new trial should be granted, for the purpose of submitting the quality and character of these books, and the question of their admissibility as receivers' books, again to the consideration of the Judge, upon a further inspection of the contents of the same.

THE KING *v.* LUCAS AND ANOTHER.

(10 East, 235—236.)

1808.
July 6.

[235]

One who has a *prima facie* title to a copyhold is entitled to inspect the Court-rolls, and take copies † of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time.

DAMPIER obtained a rule calling upon the lord and the steward of the several manors of Filby in Norfolk to shew cause why a mandamus should not issue, commanding them to permit Mr. Searle, who claimed certain copyhold lands within these manors, to inspect the Court rolls and to take copies thereof. This was obtained upon an affidavit setting forth Mr. Searle's claim as grandson and heir at law of the copyholder last seised, who died in 1774, having first devised certain estates for life and in tail, which were spent, with remainder to his daughter Mary in fee, whose eldest son the present claimant was: and which affidavit also stated that application had been made to the lord and his steward for leave to make the required inspection, which they had refused.

Park shewed cause on behalf of the lord, whose father had purchased the premises, of which he had been in possession for some years, and objected to the right of the *claimant to inspect the rolls, there being no cause depending in which the title was involved: for which he cited *The King v. Allgood*, ‡ where a similar application was denied on that ground.

[*236]

LORD ELLENBOROUGH, Ch. J.:

I do not know why there should be any cause depending in order to found an application of this sort. This is not the impertinent intrusion of a stranger; but the application of one who is clearly entitled to the copyhold, unless there be some conveyance of it by those under whom he claims: he may therefore well require to see whether there appears upon the rolls to be any such conveyance.

The COURT thereupon made the rule absolute, so far as related to the copyhold lands claimed.

† See *Mutter v. Eastern and Mid-lands Railway Co.* (1828) 38 Ch. D. 92,
105, 57 L. J. Ch. 615, 59 L. T. 117.—

B. C.

‡ 4 B. R. 574 (7 T. R. 746).

1898.
July 6.

BLEWITT v. MARSDEN.†

(10 East, 237—238.)

[237]

Where a sham plea was pleaded of judgments recovered in the Court of Piepoudre in Bartholomew Fair, in terms palpably fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings.

To an action against the acceptor of a bill of exchange the defendant pleaded a sham plea of judgments recovered in the Court of Piepoudre in Bartholomew Fair, which were framed in terms obviously denoting fictitious proceedings; and *Park* for the plaintiff in consequence applied for a rule to shew cause why the plaintiff should not be at liberty to sign interlocutory judgment in this case as for want of a plea, (treating it as a nullity; it being palpably and upon the face of it a sham plea,) and why the defendant's attorney should not pay the costs occasioned by the plea and of this motion. And on cause shewn by the *Attorney-General*, he did not attempt to justify what had been done, but endeavoured to excuse the pleader and the defendant's attorney, upon the ground of their having been misled by an improper practice which had crept in of putting such sham pleas upon the files of the Court. He observed that it might be difficult to prevent altogether the practice of putting in sham pleas of judgments recovered in the usual form; and he would not discuss the different merits of the respective forms of pleading them.

[*238]

The Court said that there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered, pleaded in the usual form, upon *motion, but await the time for producing the roll when such a plea would be regularly disproved; but they expressed great indignation against the abuse which had grown up of late and was continually increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature, making them the vehicles

† This would seem to be in point, under Ord. 27, r. 11, of the modern in case of a motion for judgment, Rules.—R. C.

of indecorous jesting; by which it sometimes happened that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points which might arise on demurrer to such sham pleas. And therefore in order effectually to put a stop to this practice in future, they made the rules absolute in this and several other causes wherein the same form of plea had been filed.

BLEWITT
v.
MARSDEN.

K. B. MICHAELMAS TERM.

SOANE *v.* IRELAND AND OTHERS.

(10 East, 259—261.)

1808.
Nov. 8.

An allegation in a declaration that one was seised of a manor of F., and that he and all those whose estate he has in the said manor have immemorially appointed a sexton of the parish of F., is sustained by proof of his seisin of a quondam manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation.

[259]

IN an action for a false return to a mandamus for appointing a sexton, the second count stated that T. S. Champneys was seised in fee of the manor of Froome Selwood, with the appurtenances, and that he and all those whose estate he has, and at the several times hereinafter *mentioned, had in the said manor, with the appurtenances, for the time being, from time immemorial have had exercised and enjoyed, and been used and ought of right to have, &c. the privilege and right of appointing a sexton of the parish of Froome Selwood when the office was and should be vacant. It then stated the vacancy of the office, at a certain time, and that T. S. Champneys duly appointed the plaintiff to it; and that the defendant Ireland being then the vicar, and the other defendants the churchwardens of the parish, had notice of such appointment, and ought to have admitted the plaintiff to the office, but had refused to do so; in consequence of which the mandamus issued to them; to which they had returned that the plaintiff was not duly appointed to it in manner and form as stated: and for this false return the action was

[*260]

SOANE
v.
IRELAND.

brought. The evidence at the trial at Wells was that Froome Selwood, which was once a legal manor, had ceased to be so for some period before the vacancy in question, for want of any freehold tenants: though in all other respects Mr. Champney's right was proved as laid. But for this objection it was urged that the plaintiff ought to be nonsuited; his right to the appointment being laid as appurtenant to his alleged seisin of a manor, which had no longer any legal existence: but BAYLEY, J. overruled the objection, and the plaintiff recovered. And now

Pell, Serjt. moved for a new trial, upon the defect of evidence to sustain the allegation of Mr. Champney's seisin of the manor in right of which the prescriptive privilege was claimed. But by

[261] LORD ELLENBOROUGH, Ch. J. :

If Froome Selwood were once a manor, as it appeared, this prescriptive right would still belong to it, though other manerial rights, such as that of holding courts for want of freehold tenants, might be gone and severed from it. It would still be a manor by reputation for this purpose, which will satisfy the allegation; and it was not necessary to prove it a continuing manor for all purposes.

PER CURIAM :

Rule refused.†

† Vide *Sir Moyle Finch's case*, 6 Co. Rep. 64, and *Rex v. The Bishop of Chester*, per Holt, Ch. J., Skin. 661, 2.

DENN, ON THE DEMISE OF BRUNE, CLERK, *v.*
RAWLINS.†

(10 East, 261—263.)

1808.
Nov. 9.

[261]

Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessor in possession under a void lease granted by tenant for life under a power, the rack rent value of which was 30*l.* a year, cannot maintain an ejectment, laying his demise, at least, on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice.

THIS was another ejectment brought to recover other lands upon the same title as was stated in the former case reported, of *Roe d. Brune v. Prideaux*.‡ The defendant claimed under a defective lease made by the last tenant for life under the power there stated; which lease reserved the ancient yearly rent of 1*l.* 18*s.* 6*d.*, and a heriot, or 1*l.* 5*s.* in lieu of it; and this rent had been received by the lessor of the plaintiff, the first tenant in tail under the settlement, from 1795, when the last tenant for life died, up to Michaelmas, 1805; the rack rent value of the premises being 30*l.* a year. This ejectment was brought in 1806, and the demise laid after the last receipt of rent, but before the ejectment brought: but no notice to quit of any kind had been given. Wherefore it was *objected at the trial, that the receipt of this ancient reserved rent by the tenant in tail was a recognition of the defendant's holding under a tenancy of some sort; if not as tenant from year to year, at least as tenant at will; and that the tenancy could not be determined, so as to make the defendant a trespasser at the time of the ejectment brought, without notice. And the defendant's counsel put his case to the jury on that ground. And BAYLEY, J. before whom the cause was tried at the last assizes at Bodmin, left the question to the jury, whether by this receipt of the old rent the lessor did not agree that the defendant should continue in possession until he received some notice to quit, so as to legalise his possession in the mean time, and prevent his being treated as a trespasser

[*262]

† Referred to in judgment of 282.—R. C.
Bramwell, L. J. in *Smith v. Widlake* ‡ P. 258, *ante* (10 East, 158).
(1877) 3 C. P. D. 10, 15, 47 L. J. Ch.

DENN dem.
BRUNE
v.
RAWLINS.

at the time of the ejectment brought: the learned Judge observing that the demise was laid on the 1st of January, 1806, which was before the delivery of the declaration; in answer to an argument urged by the counsel for the lessor of the plaintiff, that taking the defendant to be a tenant at will, (which he had denied; contending that there was no tenancy at all subsisting between these parties;) the bringing of the ejectment was a determination of that will. And the jury having found for the defendant,

[*263]

Lens, Serjt. now moved for a new trial on the ground that there was no evidence to be left to the jury of any tenancy at all subsisting which it required any notice to determine before the bringing of the ejectment; the receipt of the old conventional rent of 1*l.* 18*s.* 6*d.* being clearly referable to the void lease under the power, which had been determined not to be binding on the tenant in tail; and the great disparity between that and the fair rack *rent of 30*l.* furnishing no ground for presuming a contract of any kind between the parties for the defendant to hold as tenant on the terms of the void lease. And he referred to the case of *Right v. Bawden*† as in point; the only difference being that that was a case of copyhold, but the principle was the same. He further urged the difficulty, that if the receipt of the old rent were to be considered as any evidence of a contract that the defendant should hold as a tenant at all, as the doctrine of modern times had been, that what was formerly a tenancy at will was now to be considered as a tenancy from year to year, it might be contended that he was entitled to the regular notice to quit: but the Court having decided against that in the late case, it seemed to follow that no notice was necessary; because the relation of landlord and tenant did not in fact subsist, and could not be implied from this evidence from the manifest improbability of any contract upon such terms.

LE BLANC, J. asked from what time before the ejectment brought it could be said that the defendant became a trespasser? And BAYLEY, J. having stated as before mentioned the manner in

† 3 East, 260.

which the question had been left to the jury; the Court after some hesitation granted a rule to shew cause, &c. But, on a subsequent day in the Term, *Dampier*, who was also of counsel for the plaintiff, informed the Court that *Mr. Serjt. Lens* and himself had considered more fully of the question, and were satisfied that they could not support the rule, and therefore moved that it might be discharged; which was ordered accordingly.

DENN dem.
BRUNE
v.
RAWLINS.

LORD VISCOUNT GALLWAY v. MATHEW AND SMITHSON.

(10 East, 264—266.)

1808.
Nov. 9.

[264]

The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can the holder recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice.

THE plaintiff declared on a promissory note made by the defendants and one Whitehouse deceased on the 16th of December, 1805, payable sixty days after date to the plaintiff, or order, for 200*l.* value received; and also on the common money counts. It appeared at the trial before Lord Ellenborough at Westminster that the defendants and Whitehouse were partners in a brewery; and on the 16th of December, 1805, Mathew wrote to the plaintiff, alleging the misconduct of his partner Smithson, in consequence of which the creditors of the partnership had insisted on the payment of their demands; that there was a certain sum to pay to the excise in a few days, and no resource but to apply to friends, and therefore requesting of the plaintiff to lend him his acceptance for 200*l.* at two months, for which he would send him the promissory note of the firm payable four days before the plaintiff's acceptance became due. In consequence of this the plaintiff agreed to lend his acceptance, and Mathew drew the

LORD VIS-
COURT
GALLWAY
v.
MATHEW and
SMITHSON.

[*265]

note in question, which was signed by him for himself and his partners.† Mathew immediately procured the plaintiff's acceptance to be discounted, and applied 180*l.* of the money to the payment of the partnership debts, reserving the rest for himself. But the note in question not being paid when demanded of the defendants, the plaintiff, after renewing his acceptance to the holder, was ultimately obliged to pay it after Whitehouse's death. And now Mathew having let judgment go by default, Smithson defended the action on the ground that the plaintiff, before *he took the note in question, had notice of an advertisement then recently published in a newspaper by Smithson, wherein he warned all persons not to give credit to the defendant Mathew on his (Smithson's) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. This fact being proved, Lord ELLENBOROUGH, Ch. J. held that the plaintiff could not recover upon the count for money paid to the use of the three partners; the payment not having been in fact made till after the death of Whitehouse: nor upon the count on the promissory note, which the plaintiff had been previously warned by the defendant Smithson that Mathew had no authority from him to draw on their joint account: and therefore directed a nonsuit, which

Topping now moved to set aside on the last-mentioned ground; contending that one partner had authority by law to pledge the credit of his copartners with his own, on the partnership account; and that the plaintiff had advanced the money on their joint account, to which it had afterwards been for the most part applied. And that the declaration of the defendant Smithson, that he would not be liable for the contracts of his partners on their joint account, could not get rid of his legal responsibility. And that at all events, as the plaintiff's acceptance was discounted, and 180*l.* of it immediately applied to the partnership account, the partners were answerable for that.

† Lord ELLENBOROUGH had in the case, as reported at *Nisi Prius* (1 Camp. 403), held that the note

made in this manner was sufficient on the face of it to bind the whole firm.—R. C.

LE BLANC, J. :

Can an assumpsit be raised by one man's discharging the debt of another who desires him not to do it upon his credit ?

LORD VIS-
COUNT
GALLWAY
v.
MATHEW and
SMITHSON.

[266]

LORD ELLENBOROUGH, Ch. J. :

The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority : and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others : they may stipulate between themselves that it shall not be done ; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others.

Per CURIAM :

Rule refused.

SIR WILLIAM CURTIS AND OTHERS v. DANIEL.

(10 East, 273—277.)

1808.
Nov. 10.

[273]

Though the lord of a manor in Cornwall may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes ; yet consistently therewith, the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands, within the vill.

IN trover for copper ore raised from mines upon Towan, in the parish of St. Agnes in Cornwall, the plaintiffs claimed on the part of Mr. Donythorne, the lord of the manor of Tywarnehaile Tyas, within which manor Towan lay, though detached from the body of the manor : and it appeared that, besides the manor, the lord had title to the toll of tin ; † and that he and those under whom

† A similar right is referred to in c. 83, which confirms awards made under the Act 7 & 8 Vict. c. 105, section 2 of the Act 11 & 12 Vict.

CURTIS,
BART.
v.
DANIEL.

[*274]

he claimed had always in fact received tin dues from mines within Towan, as well under the freehold as under the customary lands there, and also under the wastrell or common called Towan Common; but no other acts of ownership had been exercised over Towan soil by the lord of the manor. The defendant claimed by lease under the respective owners of six ancient tenements in Towan vill, five of which were freehold, and the sixth was a customary freehold tenement, held according to the custom of the manor, but not at the will of the lord. And on their part it was proved that for between 20 and 30 years they had made sets of the copper mines, as well under the customary lands and under the wastrell as under the freehold lands; and that these mines had been worked *to a considerable extent, and in a manner which was notorious to the whole neighbourhood, to the plaintiffs' agents, and to the former proprietors of the plaintiffs' estate. That dues to the amount of above 700*l.* for copper ore raised under the freehold and customary lands, and as much more for dues raised under the wastrell, had from time to time been paid to the tenants, and that the value of the ore raised was ten times the amount of the dues. It was also shewn that stone had been twice taken out of a quarry on the wastrell, which was applied to the repairs of buildings on the customary tenement; and in other instances earth had been taken by the tenants of some of the six ancient tenements from the wastrell for building a wall and for making manure; and all the six tenants exclusively stocked Towan common. It also appeared that the plaintiffs and the former lords of the manor had an agent, who annually collected their tin dues; and that the former lord used to be in the parish about a month every year. At the trial at the last assizes at Bodmin, it was at first insisted, on the part of the plaintiffs, that as the lord of the manor had always received tin dues for the tin mines under Towan, he was also entitled to the copper mines, even under the freehold tenements: but this claim was finally abandoned. And it was contended, 2ndly, that

relating to the Duchy of Cornwall. By this section it appears there are two separate manors of *Tywarnehaile* and *Tywarnehaile Tyas*. *Quære*,

whether there is not some confusion between them in the text of this report? But this does not affect any principle of the decision.—R. C.

at any rate he was entitled to the copper under the customary tenement, the freehold of the soil being in him. And, 3rdly, *à fortiori*, he was entitled to the copper under the wastrell: and he claimed not merely the dues, but all the copper raised. But BAYLEY, J. held, first, that the presumption of law was that all mines under freehold belonged to the freeholder, though in Cornwall it might be otherwise as to tin mines, which were governed by peculiar laws and customs. Secondly, *that as to the customary lands, the right to the copper mines might be granted to the tenant, and it was to be collected from acts of ownership exercised by him whether it was or not. Thirdly, that though the general presumption of law was that the soil of the waste was in the lord of the manor, yet it might be shewn by evidence of acts of ownership to be in the tenants of the six tenements. That it appeared by admissions entered into between the parties before the trial that the tenants of these six tenements meant to claim the wastrell as their property, so that the lord was apprised of the necessity of proving acts of ownership therein on his part; but that all the acts of ownership over the wastrell and the customary lands, as well as over the freehold lands, except in respect of the tin mines, which was governed by a peculiar law and custom, had been exercised by the freehold and customary tenants, who had for between 20 and 30 years past received dues of copper to a very considerable amount openly from time to time in the face of the lord of the manor or his agents, while he had only received his tin dues. And upon this weight of evidence the learned Judge left it to the jury to find for the defendant; which they did.

CURTIS,
BART.
c.
DANIEL.

[*275]

Moore now moved for a new trial, and contended that the evidence given on the part of the defendant did not warrant the verdict of the jury with respect to the copper raised under the customary lands and under the wastrell, (the claim as to the copper raised under the freehold being abandoned) against the general presumption of law in favour of the lord's claim to mines under the customary lands and the wastes within the manor, fortified as it was in this case by the undisputed right of the lord to the tin *mines under all the lands of the manor, which was deci-

[*276]

CURTIS,
BART.
c.
DANIEL.

sive to shew that he was entitled to all other minerals in the soil of which the freehold must be taken to be in him. And he relied upon the case of *The Bishop of Winchester v. Knight*,† where the freehold of the soil of a customary tenement, though not held *ad voluntatem domini*, but only *secundum consuetudinem manerii*, was adjudged to be in the lord, and that he was entitled to copper ore raised by the then tenant and his ancestor out of a new mine.

(Lord ELLENBOROUGH, Ch. J.: The tenants here claim the whole soil.)

It is said at the conclusion of that report that there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. That here the taking of copper dues by the tenants was not proved many years back; and it was notorious that no copper mines had been opened in Cornwall till within the last century. That with respect to the waste, neither the depasturing by the cattle of the tenants, nor the few instances of taking earth for manure, and stone for building for the use of the customary tenant, shewed any right to mines under the soil; while the lord of the manor had at all times past taken tin, which was evidence of his right to all other minerals; and it was not till of late years that the quantity of copper raised was considerable enough to draw attention to it.

[*277] BAYLEY, J. recapitulated the leading facts given in evidence with respect to the acts of ownership by the tenants, in taking copper for between 20 and 30 years past, continually from time to time to a very considerable amount; not less than 7000*l.* worth of copper having *been shewn to be raised during this period from the wastrell; and this in the face of the lord, who used to be in the parish every year, and had agents on the spot, and who must have known it. And he stated that he had left it to the jury to determine whether from these acts of ownership in working the mines, which were by far the most valuable part of the wastrell, the property was in the tenants or in the lord of the

† 1 P. Wms. 406.

manor, who had exercised no act of ownership there, except that of taking tin, which was under a particular title and custom.

CURTIS,
BART.
v.
DANIEL.

LORD ELLENBOROUGH, Ch. J. :

Why may there not be two customs, one for the lord of the manor to have the tin, and another for these tenants to have the copper under their estates, and the waste in question? The usage which establishes the right of the lord to have the one, will also establish the right of the tenants to have the other. And here has been an adverse possession of the copper mines by these tenants for above twenty years past. Besides, if the lord of the manor thinks he can establish his right to the copper by further evidence upon another trial, there is nothing in this verdict to conclude him. The case was properly left to the jury.

Per CURIAM :

Rule refused.

DOE, ON THE DEMISE OF LAWTON, v. RADCLIFFE.

(10 East, 278—279.)

1808.
Nov. 11.

[278]

A lease, at 43*l.* a-year, granted under a power directing the best rent to be reserved, cannot be impeached merely by shewing that the lessor rejected at the time two specific offers, one of 50*l.* and another from 50*l.* to 60*l.* from other tenants; though the responsibility of such other tenants could not be disproved: for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered; unless something extravagantly wrong in the bargain for rent be shewn. *Semble* that the best rent means the best rack rent that can reasonably be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account.

THE defendant claimed under a lease made in 1799 by the last tenant for life of the estate under a power to lease for the best rent; and the remainder-man now endeavoured to impeach the lease, which had been granted at a *bonâ fide* rack rent of 43*l.* a-year, by evidence that the last tenant for life before he leased had two offers from other tenants, one at 50*l.*, and the other at near 60*l.* a-year, against whose responsibility nothing appeared. But there was contradictory evidence of opinion as to the value, whether 43*l.* a-year were not a fair rent at the time: and

DOE dem.
LAWTON
v.
RADCLIFFE.

LAWRENCE, J. before whom the cause was tried at Stafford, left the question to the jury under all the circumstances, who found a verdict for the defendant.

Abbott now moved for a new trial, on the ground that this was a verdict against the evidence; the fact not being controverted, that the late tenant for life received the two specific offers of a higher rent at the time of the lease granted from responsible tenants.

[*279] The Court, however, refused the rule; there being no pretence to impeach the lease on the ground that the letting at 43*l.* a-year was not done *bonâ fide* by the tenant for life at the time; he not having taken any fine or other consideration for the lease, and having a manifest interest to get the best rent, which under all the circumstances, *and due consideration had of the ability and good management of the tenant, could reasonably be obtained. And they said that where the transaction was fair, and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality manifestly shewn by him in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain in order to set it aside on this ground; for in the choice of a tenant there were many things to be regarded besides the mere amount of the rent offered.

Rule refused.

1808.
Nov. 11.

SPLIDT AND OTHERS, ASSIGNEES OF HOLMES, A
BANKRUPT, v. BOWLES AND OTHERS.

[279]

(10 East, 279—282.)

A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage: and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party.

By a charter-party of affreightment, made on the 11th of February, 1801, Holmes of London, the then owner of the brig

SPLIDT
v.
BOWLES.

Eliza, then on a voyage from Newcastle to London, let her to freight to Faulder of London, upon a voyage to Port Mahon in Minorca, with a cargo of coals: and Faulder covenanted with the owner, upon condition of his fulfilling all his covenants, to pay freight to the owner or his order at the rate of 51*l.* 5*s.* per keel of 15 British chaldrons in London, by good bills at 60 days from the receipt of the certificate of delivery, with demurrage at the rate of 5*l.* per day. Soon after the execution of the charter-party the brig arrived from Newcastle at London, and in April, 1801, sailed from thence to Portsmouth, where she lay waiting for convoy till August following, when she proceeded on her voyage, and arrived at Port Mahon on the 24th of October, 1801, and there *delivered her cargo; and in March, 1802, the certificate of delivery was received by Faulder in London; and there is due from him for freight 932*l.* 5*s.* and 95*l.* for demurrage. Holmes, being considerably indebted to the defendants, in April, 1801, deposited with them, by way of security, the bills of sale of the brig *Eliza*, and three other vessels; and on the 14th of September, 1801, the debt due from him to the defendants, amounting to 2,760*l.*, Holmes executed an absolute bill of sale to them of 15-16ths of the said brig; which being then at sea, all the requisites for transferring the property in her from Holmes to them were duly complied with, except the indorsement on the certificate of registry required by the stat. 34 Geo. III. c. 68, ss. 15 and 16, which was signed by one of the defendants, by virtue of a power of attorney from Holmes, on the 14th of March, 1803, being within ten days after the return of the brig to London, which was on the 6th of the same month: but the ship being, on the said 14th of September, upon her voyage to Port Mahon, every thing remained in the same state with respect to apparent ownership; and the defendants did not take actual possession until her return to the port of London. The said bill of sale of the brig was made of 15-16th parts only, because she was then at sea, and to prevent the necessity of a new register. On the same 14th of September, 1801, Holmes by indenture assigned to the defendants the policy of insurance made by him on the brig; and it was by the indenture agreed that such assignment, and also the bill of sale of the *Eliza*, were made for the purpose of

[*280]

SPLIDT
C.
BOWLES.

[*281]

securing to the defendants the payment of the said debt of 2,760*l.* and interest. And Holmes thereby covenanted that in case of default of payment according to the covenants therein *mentioned, (which default did take place), the defendants might sell the said brig or shares absolutely, and also the said policy of assurance, and convey or assign the same to the purchaser, and receive the purchase-money, and apply the same to the liquidation of their debt and interest, and of all charges, &c.; rendering the overplus, if any, to Holmes. On the 21st of November, 1801, a commission of bankrupt issued against Holmes, who was declared a bankrupt, and the plaintiffs were chosen his assignees. After the arrival of the brig *Eliza* the defendants paid several sums for wages due to the seamen, who had threatened to proceed against the brig, and the said debt of 2,760*l.* still remains due. This case came on before the Master of the Rolls upon a bill of interpleader filed by Faulder, the freighter; when his Honour directed these facts to be stated for the opinion of this Court, upon the question; Whether the defendants or the assignees of Holmes were entitled at law to 15-16ths of the said freight and demurrage? And the case stood for argument in the paper of this day, when *Lawes* was to have argued for the plaintiffs, and *Parnther* for the defendants: but when it was called on,

[*282]

Lord ELLENBOROUGH, Ch. J. said, that if the rights of the parties to receive the freight were to be considered with respect to the charter-party which was stated in the case, no question could be made at law but that the assignees of the bankrupt were entitled to receive it from Faulder. For the charter-party was a mere personal contract for the payment of the freight by Faulder to the bankrupt, and could not be assigned to the vendees by the transfer of property in the ship. The question sent to us to resolve is, who has the title at law to the freight and *demurrage, which are covenanted to be paid by the charter-party; and at law we cannot say that the covenant is transferred to the assignees of the ship by the assignment of the property in the ship, in the same manner as certain covenants are said to run with land. We must therefore certify that the assignees of the

bankrupt under the bankrupt laws, and not the assignees of the ship by the bankrupt's own conveyance, are entitled to the freight and demurrage under the charter party.†

SPLIDT
v.
BOWLES.

THE KING v. THE INHABITANTS OF BRAMPTON.

(10 East, 282—291.)

1808.
Nov. 12.

[282]

Evidence that British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the church of England, and they received a certificate of the marriage, which was afterwards lost, is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife, till the period of the husband's death.

And such British subjects being attached at the time to the British army on service in such foreign country, and having military possession of the place, it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence), would be a good marriage by the law of England, as a marriage contract *per verba de presenti* before the Marriage Act; marriages beyond sea being excepted out of that Act. And it would make no difference if solemnized by a Roman Catholic priest.

LYDIA, the widow of Edmund Hudson, deceased, and their children, were removed by an order of justices from Brampton in Norfolk, to St. Edmund in Norwich; which order was quashed by the Sessions on appeal, subject to the opinion of this Court on the following case.

Lydia the pauper, in 1795, accompanied her then husband, a serjeant of dragoons in the British army, to St. Domingo, where he died. After his death, in 1796, at Cape St. Nicola Mole, in the said island, she became acquainted with Edmund Hudson, a serjeant in the 26th light dragoons, then serving there: and both parties wishing to *marry each other went to a chapel in the town of Cape St. Nicola Mole in order to be married; and there a service was read in the French language by a person dressed like a priest, and interpreted into the English language by a

[*283]

† Vide *Chinnery v. Blackburne*, B. R. E. 24 Geo. III., 2 B. R. 731 (1 H. Blac. 117, n.).

THE KING
 "THE INHABI-
 TANTS OF
 BRAMPTON.

person officiating as clerk. The pauper Lydia did not understand the French language, but by the interpreter she understood it was the marriage service of the Established Church of England read in French. She did not know that the person officiating was a priest. She received a certificate of marriage, which she has lost. There was no chaplain at that time with the British forces in St. Domingo. No evidence was given of the laws or usage respecting the marriage ritual in that island. The said Edmund and Lydia lived together as man and wife till May, 1807, when he died; being at the time of his death a settled inhabitant of St. Edmund, Norwich. In January, 1808, the widow was removed.

Wilson and *Alderson*, in support of the order of Sessions, after observing that the cohabitation of Edmund and Lydia Hudson stated in the case, being referable to a marriage in fact there stated, must depend, as to its legality, upon the validity of that marriage, contended that the marriage was invalid. 1st, The marriage cannot be supported by the local law of St. Domingo, because no evidence was given of that law, by which only it can be ascertained to have been legal there; as was held by Lord KENYON in *Ganer v. Lady Lanesborough*,† upon a similar question of divorce. And as far as any fact can be noticed out of the case, it is notorious that the established religion of that country is the Roman Catholic; *and the evidence, as far as it goes, negatives that it was by that ritual. 2ndly, It is not a good marriage by the law of England: for though marriages beyond the seas are excepted out of the prohibition of the Marriage Act,‡ yet, as before that Act in England, they must be celebrated by a person in holy orders; and therefore in *Haydon v. Gould*,§ where the parties were Sabbatarians, and the ceremony was performed according to the rites of their sect, and they had lived together for seven years as man and wife, till the death of the latter; yet the officiating minister being a mere layman, the Ecclesiastical Court repealed the letters of administration which had been granted to the husband; and the delegates, on

[*284]

† 3 R. R. 647 (1 Peake's N. P. Cas. 25).

‡ 26 Geo. II. c. 33, s. 18.
 § Salk. 119.

appeal, affirmed the sentence. In *Mr. Fielding's* case,† the marriage was celebrated in his own lodgings by a Roman Catholic priest belonging to the suit of the Imperial Envoy : but here there is no proof that the person who officiated was a priest ; it only appears that he was habited like one.

THE KING
v.
THE INHABI-
TANTS OF
BRAMPTON.

(Lord ELLENBOROUGH, Ch. J. : A Roman Catholic priest is so far acknowledged by our Church as a person in holy orders that if he renounce the errors of the Church of Rome, he is a priest without any new ordination.)

There is this singularity also attending the marriage, that though performed in a Roman Catholic country, by a French priest in his own language, the service was understood to be performed according to the rite of the Church of England. This consideration might have weighed with the Sessions in inducing them to discredit, as they have done by their order, the whole transaction.

(The Court here observed that they must assume that the Sessions believed the facts sworn to, which are stated in the case, otherwise they would not have reserved the question for their opinion.)

[285]

Peake and *Frere*, *contra*, maintained that there was evidence of a good marriage both by the laws of St. Domingo and of England. As to the first, there is evidence of a ceremony having been performed which the parties meant and understood to be the ceremony of marriage ; and it was performed in a public place of worship, and in a public and solemn manner, by a person habited like and believed to be a priest, and officiating as such : these facts therefore raise a presumption that the ceremony was legally performed according to the law of the country, unless the contrary be shewn. But if that were doubtful, 2ndly, it was a good marriage by the law of England as it stood here before the Marriage Act, and as it now stands with respect to marriages beyond sea, which are excepted out of that Act. In *Haydon v. Gould* it was found as a fact that the person who officiated as minister was a

† 5 St. Tr. 610 (folio ed.).

THE KING
v.
THE INHABI-
TANTS OF
BRAMPTON.

[*285]

layman ; and that decision went upon the ground, that as the husband demanded a right in the ecclesiastical court, which was only due to him by the ecclesiastical law, he must prove himself a husband according to that law. But the Court seem to have distinguished his claim from that of the wife or issue entitling themselves by such marriage to a temporal right. And in *Jesson v. Collins*,† where a prohibition was moved for to stay a suit in the spiritual court upon a contract of marriage *per verba de presenti*, upon a suggestion that it was *per verba de futuro*, *the writ was denied ; it being a matrimonial question of which that Court had jurisdiction : and Lord Ch. J. HOLT said, that a contract *per verba de presenti* was a marriage ; viz. “ I marry you : ” “ You and I are man and wife. ” And in the report of the same case in 6 Mod. 155, he says that such a contract “ amounts to an actual marriage, as if it had been *in facie ecclesie*. ” And in this all the Court agreed. Dyer, 369 a, is to the same effect. In *The King v. Fielding*‡ the marriage here by a Roman Catholic priest was held good, on evidence of the words of present contract, which were spoken in English ; the rest of the ceremony being read in the Latin tongue, which the witness present did not understand. Though the curtesy of the law of England recognizes marriages in a foreign country celebrated according to their law ; it does not follow that a marriage between English subjects according to the law of England would not be good, if celebrated in a foreign country ; though not according to their law. Marriages by English subjects have often been made abroad in the chapels of our ambassadors.

(Lord ELLENBOROUGH, Ch. J. : If made by the allowance of the foreign State in such places, they would be good marriages in those countries. But if not a good marriage in the place where it is celebrated, it cannot be a good marriage any where.)

Still if celebrated openly in that country, the presumption is that it is good there : and the onus of shewing that it is void lies on the party who disputes it. It is at least evidence that it was allowed by the curtesy of the foreign state. Lord MANSFIELD in

† Salk. 437, and 6 Mod. 155.

‡ 5 St. Tr. 610.

The King v. Stockland† considered the mere cohabitation together as man and wife for 80 years as evidence *of a marriage on a question of settlement, and the only exceptions made to the rule in *Morris v. Miller*‡ were in prosecutions for bigamy§ and in actions for criminal conversation. Upon a late prosecution for bigamy at Guildford, before the Lord Chief Baron, where the first marriage was at Gretna Green in Scotland, his Lordship refused to receive evidence of the law of Scotland in respect to the legality of such marriage from the witness who was a tobacconist.

THE KING
v.
THE INHABI-
TANTS OF
BRAMPTON.
[*287]

LORD ELLENBOROUGH, Ch. J. :

The facts are shortly these : a soldier on service with the British army in St. Domingo in 1796 being desirous of marriage with the widow of another soldier who had died there in the service, and both parties being desirous of celebrating their marriage with effect, they went to a chapel in the town where they were, and there the ceremony was performed by a person appearing there as a priest and officiating as such ; the service being in French, but interpreted into English by one who officiated as clerk ; and which the pauper understood at the time to be the marriage service of the Church of England. After this they cohabited together as man and wife for 11 years until the death of the husband. And now it is made a question upon these facts, which we must take it the Sessions believed to be true, otherwise they would not have stated them to us for our opinion, whether this were reasonable evidence of a marriage *in St. Domingo at that time, upon which the Sessions ought to have adjudged the settlement of the wife to be in the husband's parish. First, considering it as a marriage celebrated in a place where the law of England prevailed : for I may suppose in the absence of any evidence to the contrary, that the law of England ecclesiastical and civil was recognized by subjects of England in a place

[*288]

† Burr. S. C. 509.

‡ 4 Burr. 2059.

§ *Vid.* the report of *Morris v. Miller* in 1 Black. 632, where the Court refer to the case of an indictment for bigamy on the Norfolk Circuit, in which DENISON, J., ruled

that though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shewn. This it seems must be understood where there is *prima facie* evidence of a lawful marriage.

THE KING
v.
THE INHABI-
TANTS OF
BRAMPTON.

occupied by the King's troops, who would impliedly carry that law with them. It is then to be seen whether this would have been a good marriage here before the Marriage Act. Now certainly a contract of marriage *per verba de presenti* would have bound the parties before that Act; and this appears to have been *per verba de presenti*, and to have been celebrated by a priest, that is by one who publicly assumed the office of a priest and appeared habited as such; of what persuasion indeed, whether Roman Catholic or Protestant, does not appear. But even if it were performed by a Roman Catholic priest, that would not vary the case; for such a person would be recognized by our Church as a priest capable of officiating as such, upon his mere renunciation of the errors of the Church of Rome, without any new ordination. But the case of *The King v. Fielding* is in point to shew that a marriage by a Roman Catholic priest, (before the Marriage Act) was effectual for this purpose. That was a marriage in England by a Roman Catholic priest in the year 1705 before the Marriage Act: and upon evidence that the prisoner, in answer to the question, whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband; Mr. Justice POWELL upon a question of felony considered it as a marriage contracted *per verba de presenti*; *in like manner as it was considered by Lord HOLT in *Jesson v. Collins*. And here there is this further circumstance, that the ceremony was performed in a public chapel, instead of in private lodgings, as it was in Mr. Fielding's case. Considering the case therefore to be that the King's forces carried with them the law of England to St. Domingo, by which they and other subjects who accompanied them (in the absence of proof that any other law was in force there) may be considered as continuing to be governed; this would be a good marriage by that law. But supposing the law of England not to have been carried to St. Domingo by the King's forces, nor obligatory upon them in this particular, let us consider whether the facts stated would not be evidence of a good marriage according to the law of that country, whatever it might be. And indeed after the ceremony of

[*289]

marriage, as it was understood and intended by the parties at the time to be, performed openly in a chapel, by a person appearing there as a priest authorized to perform the ceremony of marriage; and this followed by a cohabitation between the parties as man and wife for 11 years afterwards; every presumption is to be made in favour of its validity. I should have considered myself as safe in resting my opinion in favour of this marriage upon the law of England as it exists independent of the provisions of the Marriage Act. But without the aid of that, I think every presumption must be made in favour of its validity according to the law of the country where it was so celebrated; having been performed there in a proper place, and by a person officiating as one competent to perform that function.

THE KING
v.
THE INHABITANTS OF
BRAMPTON.

GROSE, J.:

[290]

The question is, whether this were a good marriage? And in determining that, I have no objection to consider whether it be a good marriage either according to the law of England, or according to the law of the country where it took place. Upon the former ground, I rather think that it was good by the law of England for the reasons which have been stated by my Lord. But considered as a marriage by the law of the country where it was celebrated, I think there can be no doubt. The parties meant to be married; they went openly to a chapel in the country where they were; they found there a person appearing as a priest of the country, and they were married by him; the service was performed in French, but it was translated to the parties, and they understood it to be the marriage ceremony. From these facts the presumption would be that it was a marriage according to the law of that country, by a priest of that country cognizant of its laws in that respect, and who it must be presumed would celebrate it according to the law of his own country. There is therefore a fair and reasonable presumption that these parties were regularly and legally married according to the law of St. Domingo. I should think the marriage might be sustained according to the law of England, but I have no doubt that it is sustainable by the law of the country where it was celebrated.

THE KING
c.
THE INHABI-
TANTS OF
BRAMPTON.

LE BLANC, J. :

[*291]

The Sessions have stated to us the facts proved in evidence before them, and they desire to know what is the legal conclusion from that evidence. They state in substance that the parties named, being in St. Domingo, and wishing to be married, went in 1796 to a *place of worship in that country, and were married by a person appearing there as the priest, and that they have since cohabited as man and wife till his death in 1807. And the question is, whether this be not sufficient evidence that the marriage was properly celebrated. It is no objection to it for the woman to say that she did not know that the person officiating was a priest : for the same answer would probably be given by most persons who are married here. They must for the most part say that they did not know that the person who officiated was a priest ; but it would be sufficient evidence of the marriage that the ceremony was performed by a person officiating as a priest in a regular place of marriage. And this answer of hers was no reason for the Sessions to say that the marriage was not performed by a person in holy orders.

BAYLEY, J. :

The facts stated are strong evidence of a marriage ; and I cannot presume from any of these facts that the person who officiated was not a priest in holy orders, or indeed that he was a Roman Catholic priest. He officiated as a priest in an appropriate place in the country, and married these parties ; and after so many years cohabitation as man and wife since that period, I cannot possibly say but that this was evidence of a marriage.

Order of Sessions quashed.

RITCHIE v. ATKINSON.†

(10 East, 295—312.)

1808.
Nov. 15.

[295]

Where the master and the freighter of a vessel of 400 tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c. : one half to be paid on right delivery, the other at three months : held that the delivery of a complete cargo was not a condition precedent ; but that the master might recover freight for a short cargo at the stipulated rates per ton ; the freighter having his remedy in damages for such short delivery.‡

THIS was an action of *indebitatus assumpsit* for the freight of goods conveyed in the ship *Adelphi*, of which the plaintiff was master, from St. Petersburg to London, and delivered to the defendant or his order. There was also a count on a *quantum meruit* for freight, and the common counts for work and labour, and for money paid, &c. The defendant pleaded the general issue ; and at the trial at Guildhall before Lord Ellenborough, Ch. J. a verdict was found for the plaintiff for 960*l.* 15*s.* subject to the opinion of this Court on the following case.

The plaintiff being master of the ship *Adelphi*, in August, 1807, chartered her to the defendant by the following instrument : “ Memorandum for charter. London, 12th August, 1807. It is this day mutually agreed between Captain J. Ritchie, of the ship *Adelphi*, burden 400 tons or thereabouts, now in the river, and W. Atkinson, of London, merchant, that the said ship, being tight, and every way fitted for the voyage, shall with all convenient speed sail and proceed to St. Petersburg, or so near thereunto as she may safely get, and there load from the factors of Wm. Atkinson, a complete cargo of clean hemp, and 80 tons of iron for ballast, not exceeding what she can reasonably stow, &c. ; and being so loaded shall therewith proceed to Woolwich and London, and deliver the same, on being paid freight for clean hemp 5*l.* per ton, for ballast iron 5*s.* per ton, with two-thirds port charges and pilotage as customary ; restraint of

[296]

† Referred to in judgment of ERLE, Ch. J., in *MacAndrew v. Chapple* (1866) L. R. 1 C. P. 643, 648, 35 L. J. C. P. 281.—R. C.

‡ See *Atkinson v. Ritchie*, p. 372, post (10 East, 530), where this remedy was given.—R. C.

RITCHIE
v.
ATKINSON.

[*297]

princes and rulers during the said voyage always excepted : one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in 3 months following. Thirty running days are to be allowed the said merchant, (if the ship is not sooner dispatched,) for loading her at St. Petersburg, and thirty running days for delivery at Woolwich and London, and ten days on demurrage over and above the said laying days at 6*l.* per day. Penalty for non-performance of this agreement, 2,000*l.* The ship to sail with convoy from the Sound for England. WM. ATKINSON." The *Adelphi* sailed in ballast from Deptford on the 24th of August, 1807, and arrived at Cronstadt, the port of St. Petersburg, on the 16th of September following ; where the plaintiff proceeded to take in her cargo under the charter-party, and continued loading her with all due diligence *until the 25th of September, and had then taken on board between 70 and 80 tons of iron for ballast, the same being a sufficient quantity for ballast, and a considerable quantity of hemp. On the 25th of September there was a general rumour of an embargo being intended to be laid by the Russian Government on all British vessels ; and there was every appearance that it would take place immediately ; but it did not in fact take place then, nor until six weeks afterwards : but on the 25th of September, Mr. Booker, the agent for the British factory at Cronstadt, and also the agent to the house of Hubbard & Co. the defendant's agents, in consequence of instructions that he had received from Sir Stephen Shairp, his Majesty's Consul General at St. Petersburg, desired the captains of such British vessels as were ready to proceed to sea, to do so as soon as possible, as he expected an embargo might take place immediately. (The case then set out a circular letter of advice to that effect, written to the captains of British vessels by the consul's agents.) In consequence of which the plaintiff gave directions to leave off screwing down any more hemp, which is the usual mode of loading, and to fill the ship up as fast as possible by hand ; and the whole of this day was occupied in loading the vessel in this manner till 6 o'clock ; at which time she was filled up as far as could be done by hand ; and the ship sailed on the evening of the 25th of September with a cargo more than half what she

could have carried, though there was at the time as much hemp of the defendant's lying in lighters alongside of the vessel as would have completely loaded her. The plaintiff acted *bonâ fide* and as an honest man under the existing circumstances, and there was a reasonable and well-grounded apprehension for his acting as he did; *and he brought home as complete a cargo as he could under the circumstances. Several other vessels sailed the same evening as the *Adelphi*. All or almost all the vessels which had passes sailed either the same evening or the next morning without full cargoes, under the apprehensions of an embargo: but some other British vessels did not sail from Cronstadt at that time, and were not detained, but completed their loading: and if the *Adelphi* had staid, she might have completed her loading. The plaintiff sailed without any previous communication with Hubbard & Co., the defendant's agents, to whom he was addressed; they residing at St. Petersburg. As soon as they had notice of the circumstances they immediately came to Cronstadt with an intention to stop the ship, but it was too late; and they then formally protested against him for breach of his charter-party. The *Adelphi* arrived in London and delivered her cargo there to the defendant, who refused to pay the freight, as little more than a moiety of the quantity of hemp stipulated by the charter-party was brought by the plaintiff. The freight of the iron and hemp so brought to London and delivered to the defendant amounted, according to the rate stipulated in the charter-party, to 960*l.* 15*s.* And the verdict for that sum was to stand, if the Court thought that the plaintiff was entitled to recover; otherwise, a nonsuit was to be entered.

[After argument, in which (*inter alia*) were cited on behalf of the plaintiff, *Boone v. Eyre*, 2 R. R. 768 (1 H. Bl. 273, *n.*), *Campbell v. Jones*, 3 R. R. 263 (6 T. R. 573), *Cook v. Jennings*, 4 R. R. 468 (7 T. R. 381), and *Luke v. Lyde*, 2 Burr. 882, and 1 Black. Rep. 190:]

LORD ELLENBOROUGH, Ch. J. :

If the delivery of a complete cargo were a condition precedent to the recovery of any freight, no doubt the defendant would be entitled to require the strictest performance of it: but the

RITCHIE
v.
ATKINSON.

[*298]

[306]

RITCHIE
v.
ATKINSON.

[*307]

question is, Whether it be a condition precedent? and that depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract : whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other. The rule was well laid down by Lord MANSFIELD in *Boone v. Eyre*, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other ; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it ; but it is not a condition precedent. *That was a case where the plaintiff had conveyed to the defendant a plantation in the West Indies, with the negroes on it, and had covenanted that he had a good title, and was lawfully possessed of the negroes ; and the defendant covenanted, that the plaintiff, well and truly performing all and every thing in the deed contained on his part to be performed, he, the defendant, would pay a certain annuity. And to an action on covenant for non-payment of the annuity the defendant pleaded, that the plaintiff was not at the time legally possessed of the negroes, and so had not a good title to convey. But, on demurrer, Lord MANSFIELD said that if such a plea were to be allowed, if any one negro were not the property of the plaintiff, it would bar the action. He must therefore have considered that such a covenant was in its nature apportionable according to the damage sustained by the breach of it, and did not make a condition precedent to the payment of the annuity. Now apply that to the present case. Here is a ship of about 400 tons, which is freighted to go to St. Petersburg, and to bring home a complete cargo of hemp and iron, and to deliver the same on being paid freight at so much per ton on each commodity. If the owner be not entitled to recover freight for any proportion of goods he may bring home short of a complete cargo, and it should appear by any subsequent admeasurement of the vessel, even after the delivery of the cargo, that there was wanting some small fraction of a complete cargo ; if the ship had been supposed to measure 400 tons, and a cargo adapted to that proportion had been

loaded, and it turned out that she measured 10 or 20 tons more; the owner would altogether be defeated of his remedy for the whole freight. But would not such a construction be contrary to common *sense and the true nature of such a contract; and can any such meaning be fairly inferred from the terms of it? But it is said that a different construction will bear hard upon the merchant who has stipulated for the delivery of a complete cargo. It does not follow, however, from thence, that if there has been an imperfect delivery, he will be ousted of his remedy: for clearly an action on the case lies against the captain who has made an imperfect, when he could have made a perfect delivery. But I should require the strongest authority to be adduced before I held that this was a condition precedent, when the consequences of such a construction would be such as I have before stated. There is no case, however, where the delivery of less than a complete cargo has been held not to be apportionable. Where, as in *Smith v. Wilson*,† the freight is made payable upon an indivisible condition, such as in that case the arrival of the ship with her cargo at her destined port of discharge; such arrival, &c. must be a condition precedent; because it is incapable of being apportioned: but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery. And all the cases of conditions precedent have been where the thing to be done was a strict indivisible condition. The same may be said of the case of the five ships mentioned from Malynes,‡ which were freighted out to Leghorn and Civita Vecchia, there to remain a certain time and take in their lading and return home; and some of them came away *without any lading, before the precise time stipulated for their abiding there to be laden had expired. In this case, however, the condition is divisible, and the real justice of the case will be attained by the plaintiff's recovering his freight in the proportion per ton of the goods delivered; and the remedy of the defendant will still be entire to punish the master for his imperfect and wrongful delivery.

RITCHIE
v.
ATKINSON.

[*308]

[*309]

† 8 East, 437.

‡ Mal. Lex Merc. 98.

RITCHIE GROSE, J. :

ATKINSON.

[*310]

It is not a condition precedent to the claim of freight that a complete cargo should be delivered. The agreement, however, does contain a condition precedent in one part ; for the payment of the freight is made a condition precedent to the delivery of the cargo ; the master being to “ deliver the same on being paid freight.” This is strong to shew that the parties knew how to make a condition precedent where it was so intended : but they have not done so in the instance now in question. And to construe the delivery of a complete cargo to be a condition precedent to the right to recover any freight would be manifestly unjust ; because if default were made in ever so small a proportion of that which would be a complete cargo, the master would not be entitled to any freight for however large a proportion of goods he may have delivered. The reasonable construction therefore is, that the plaintiff should receive freight according to the quantity per ton which he has delivered. But it is said that the intention of the parties was that the defendant should receive a complete cargo, as much as could be stowed in the ship ; and that this was a material stipulation to be performed for his benefit. I will not say now that it was not so : but taking it to be so, the defendant has his remedy for the breach of it. *If either of the parties break his part of what he has engaged to do, he will be answerable to the other. In this way perfect justice will be done to both : but not so if the delivery of a complete cargo were made a condition precedent to the payment of any freight : and therefore I do not think that it was the intention of the parties to make it so. The cases, where acts stipulated to be done by one party have been held to be conditions precedent to the claim of the other, have been where it appeared upon the face of the contract to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other. But no such intention appears here.

LE BLANC, J. :

The question depends on the construction to be put upon this instrument ; whether we can see from the whole of it that it was

the intention of the parties that the delivery of a complete cargo should be a condition precedent to the recovery of any freight at all. This rule was laid down in one of the early cases, *Kingston v. Preston*,† which has been since followed in others. Now the delivery of the cargo was in its nature divisible; for it consisted of hemp and iron, the freight of which was to be paid for by the ton, according to a different rate of payment for the one and for the other: and therefore we cannot collect the intention of the parties to have been to make the delivery of a complete cargo a condition precedent to the payment of freight for any part which was delivered. The rule was laid down in *Boone v. Eyre*, and approved by this Court in *Campbell v. Jones*, and by the Court of Common Pleas in *The Duke of St. Albans v. *Shore*,‡ that where a covenant goes to the whole of the consideration on both sides, there it is a condition precedent: but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight; because the failure of bringing home one ton less than the full quantity of 400 tons would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to the injury suffered by the defendant. The fair construction therefore is, that the plaintiff should recover freight for what he has performed; and that the defendant should have a remedy against him for that which he has not performed, and which he ought to have done.

RITCHIE
v.
ATKINSON.

[*311]

BAYLEY, J.:

There would be great injustice done by holding this to be a condition precedent; and none by a different construction; because if the defendant has sustained any injury by the non-delivery of a complete cargo, he will recover a compensation in damages commensurate to such injury. It is necessary to look to the instrument to see whether this be a condition precedent;

† E. 13 Geo. III. stated at length ‡ 1 H. Bl. 271.
in *Jones v. Barkley*, Dougl. 689.

RITCHIE
v.
ATKINSON.

[*312]

to see what the intention of the parties was in this respect. It begins by stating that "it is this day mutually agreed," &c. That would have some little influence to shew that each of the parties had mutual stipulations to make. Not that those words would control the meaning of the subsequent words, if it clearly appeared that a condition precedent was intended by them. Then the captain engages that the ship shall be "tight, &c. and every way fitted for the *voyage, and shall with all convenient speed sail and proceed to St. Petersburg." Now if those were to be deemed conditions precedent, then if there were any defect in the fitting out, or an hour's delay in the sailing, the remedy for the freight would be defeated. Could that have been intended by the parties? Then the ship is to return with a complete cargo: and if that were a condition precedent, then if there were a deficiency of one ton only in the cargo, though all the rest were delivered, the defendant would have all the benefit of such delivery without being obliged to pay any thing for it. Is that reasonable? and can we collect any such intention from the instrument? In *Cook v. Jennings* the freight was to be paid for deals delivered at Liverpool: none were delivered at Liverpool; and therefore no freight could be due. In *Bright v. Cowpert* an entire sum was to be paid; and therefore unless the plaintiff was entitled to recover the whole, he could not recover any part. Unless therefore there was a performance of the whole for which that entire sum was to be paid, which there was not; he could recover nothing. But there is nothing here to shew that it was the intention of the parties, that the delivery of a complete cargo should be a condition precedent to the recovery of any freight actually earned. Great injustice would ensue from holding it to be so; and no injustice to either party from holding it not to be so.

Postea to the plaintiff.

DELANOY *v.* CANNON.

(10 East, 328.)

1808.
Nov. 21.

[328]

After a writ sued out, and common bail filed, against a defendant by the name of J., it is irregular for the plaintiff to declare against him by the name of R., sued by the name of J.; and the defendant may set aside the proceedings before plea.

A WRIT was sued out against the defendant by the name of John, and common bail filed against him by the same name: and then the plaintiff declared against him by the name of Robert (his real name) sued by the name of John; on which *Espinasse* obtained a rule *nisi* to set aside the proceedings for irregularity; against which *Richardson* now shewed cause, and cited *Oakley v. Giles*.† But the COURT observed that the application to set aside the proceedings for irregularity was not made till after judgment, and when the defendant might have before pleaded in abatement; but here it is before plea. He then referred to *Symmers v. Wason* in C. B.;‡ where a similar objection was over-ruled in the case of bailable process. To which it was answered that the cases of *Green v. Robinson*,§ and others to the same effect,|| had not been there mentioned; which cases shewed the proceedings here to be irregular. And the COURT made the

Rule absolute.

† 3 East, 167.

Prac. 366.

‡ 1 Bos. & P. 105.

|| Vide *Doe v. Butcher*, 3 T. R. 611,§ H. 23 Geo. III. Vide 1 Tidd's and *Corbett v. Bales*, *ib.* 660.

1808.
Nov. 22.

BAINBRIDGE AND ANOTHER v. NEILSON.

(10 East, 329—348.)

[329]

A ship insured from Jamaica to Liverpool was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment: and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in Ireland, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage, and arrived at Liverpool, and earned her freight; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent.: held that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. And *quære* whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss.†

The like point was ruled on the freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent.

But at any rate if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it.

THIS was an action upon a policy of assurance upon the ship *Mary*, valued at 6,000*l.*, at and from Liverpool to any port or ports in Jamaica, during her stay there, and from thence to her port of discharge in Great Britain, &c.: and also upon another policy of insurance upon the freight of the same ship from Jamaica to her port of discharge in Great Britain, valued at 4,000*l.* At the trial at Guildhall a verdict was found for the plaintiffs for 139*l.* 5*s.* 4*d.*, subject to the opinion of this Court on the following case.

The defendant subscribed both the policies for 200*l.* each.

† In the judgment of the Court delivered by Lord TENTERDEN, Ch. J., in *Naylor v. Taylor* (K. B. 1829) 9 B. & C. 718, 724, it is stated that notwithstanding the doubt expressed by a very high authority (Lord ELDON) in *Smith v. Robertson* (1814) 2 Dow, 474, the rule as laid down in *Bainbridge v. Neilson*, namely, that

abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought, is established, having been adopted and acted on by the Court in the two subsequent cases of *Patterson v. Ritchie* (K. B. 1815) 4 M. & S. 393, and *Brotherston v. Barrier* (K. B. 1816) 5 M. & S. 418.—B. C.

The plaintiffs at the time of effecting the insurance, and also at the time of the capture after mentioned, were interested in the ship and freight. The ship sailed in due time from Jamaica with a cargo and freight bound to Liverpool; and on the 21st of September, 1807, was captured on her voyage home by an enemy; and on the 25th was re-captured. On the 30th of September the plaintiffs received intelligence at Liverpool of the capture, but not of the re-capture; and on the day following communicated the same to the underwriters, and gave notice of abandonment. On the 2nd of October the intelligence of the capture was confirmed; and on the 6th of October, being five days after the notice of abandonment, *the plaintiffs received the first intelligence of the re-capture of the vessel, and that she then lay at Lough Swilly in Ireland, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment, but offered to do their best for the benefit of those who should be ultimately concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs compromised with the recaptors; and the vessel has been restored, and has arrived at Liverpool, being her port of discharge, according to the terms of the policy, where she now is in safety. And the owners have also, without prejudice, received the freight of the goods on board her, and the proportion of salvage and expenses on such goods. The plaintiffs obtained possession of the vessel at Lough Swilly under the said agreement after notice of abandonment, but before the action was brought; and the vessel did not arrive at Liverpool until after the commencement of the action. The ship was never taken into an enemy's port, nor did she sustain any damage whilst in possession of the enemy. The amount of the salvage damages and charges upon the ship is 15*l.* 4*s.* 8*d.*, and upon the freight 13*l.* 11*s.* 5*d.* per cent., on the sum insured. The defendant paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.*, being the amount of his proportion of an average loss upon the two policies; which sum the plaintiffs accepted, without prejudice to their claim to

BAINBRIDGE
v.
NEILSON.

[*330]

BAINBRIDGE ^{v.} NEILSON. recover a total loss under their abandonment. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover for a total loss? If they were, then the verdict was to stand : *if not, the verdict was to be entered for the defendant.

[*Scarlett*, for the plaintiffs, cited *Goss v. Withers*, 2 Burr. 683, and *Hamilton v. Mendez*, 2 Burr. 1198.

Holroyd, *contra*, cited *M'Carthy v. Abel*, 7 R. R. 711 (5 East, 388.)]

[339] *Scarlett*, in reply. * * *

[340] LORD ELLENBOROUGH, Ch. J. :

This is a case, which, though new in specie, is by no means new in principle. And though Lord MANSFIELD said, in *Hamilton v. Mendez*,† that he would not give an opinion how the case would be if the ship were restored in safety between the offer to abandon and the action brought, yet there can be no doubt from the whole of his reasoning on that case what his decision would have been under these circumstances. The facts here are that the ship was captured on the 21st of September, and recaptured on the 25th ; after which, the plaintiff having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 31st ; which he persevered in after the 6th of October, when news of the recapture arrived, and that the ship was safe in a port of Ireland ; but which notice the underwriters did not accept. And now it appears that instead of a total loss, there has been a small partial loss of 18*l.* and a fraction, for salvage and charges on the policy on freight, and 15*l.* and a fraction on the ship policy, and that no damage whatever was sustained by the ship while in the possession of the enemy. *And the question is, whether that which in the result turns out to be only a partial loss to a trifling extent shall, because of the notice of abandonment given when a total loss appeared to exist, be now recovered as a total loss ? To give effect to such an attempt would grievously enlarge the responsibility of underwriters : it would be to make them answerable, not for the actual loss sustained by the assured

† 2 Burr. 1198.

BAINBRIDGE
v.
NEILSON.

whom they have undertaken to indemnify against the risks stated in the policy, but for a supposed total loss, which had in fact ceased to exist. It has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events. But that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment: but it is not enough that it was properly made, upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and *bonâ fide* credited, by an assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a forgery; and yet clearly no right of action would vest in him founded upon an abandonment made upon false intelligence, and without any thing in fact to warrant the giving of such notice. What is an abandonment more than this, that the assured having had notice of circumstances, which, if true, entitle him *to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as well as he can. But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriter for an indemnity: and if they be all imaginary, or founded in misconception, or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act, (the recapture,) which saves the thing insured from sustaining a total loss; the whole foundation of the abandonment fails. It is then said that if the right of abandonment once vested and be exercised in time, it cannot be divested by subsequent intelligence of other circumstances or different events. But the case of *M'Carthy v. Abell*† shews the contrary; for there, though the notice of abandonment

[*342]

† 7 R. R. 711 (5 East, 388).

BAINBRIDGE ^{v.}
NEILSON. were well made at the time, it was not only devested by subsequent circumstances, but by circumstances which happened after the notice of abandonment had been given. Next it is contended that by the recaptors taking the ship into a port in Ireland the right of abandonment was revived, or a new right created; for I do not exactly understand whether this be insisted on as an entire and distinct cause of abandonment, or as connected with the antecedent capture and recapture. Now if it grew out of the recapture, let us hear what Lord MANSFIELD said upon that subject in *Hamilton v. Mendez*. It does not, he says, cease to be a total loss because of the recapture, "if the voyage is absolutely lost, or not worth pursuing;" (here the voyage was not lost, and was worth pursuing, and was pursued with effect :) "If the salvage is very high:" (here it is very trifling :) [*343] further expense is necessary; if the insurer *will not engage in all events to bear that expense," &c. But here the further expenses were little or nothing beyond the salvage, and all the loss has been actually paid into the plaintiff's hands. If after the recapture the ship had been carried into a port abroad, and a sale had become inevitable, because nobody would secure to the recaptors their 1-8th, it might have been deemed to be a total loss: but that is not the present case. What was said by Lord MANSFIELD, however, is sufficient to shew that in the case of a capture and recapture, it does not necessarily follow that the assured is entitled to abandon as for a total loss; but it depends upon circumstances; and none of the circumstances enumerated by him exist in the present case. I cannot however consider, as at present advised, that the right of abandonment relates only to the actual state of things at the time of the offer to abandon made. If it were necessary to the decision of this case, I should wish to have that point well considered. I am not disposed to enlarge the grounds of abandonment against underwriters, a privilege which, every body knows, has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and therefore it behoves the Court to watch every such case, and in no instance to enlarge that which in the nature of the thing is only a partial, into a total, loss. It might as well have been said in *M'Carthy v. Abel*, that having been

once a total loss, it must continue so: but the Court held otherwise; and that case is not distinguishable in this respect from the present, except that there eventually there was no loss there of the subject-matter of the insurance, and here there is only a partial loss: but I can see no difference whether that which for a time was a total loss ceased altogether by subsequent events to *be any loss at all, or whether it be reduced by subsequent events to so small a loss as there is in the present case. We must look, as we lately said in *Godsall v. Boldero*,† to the real nature of the contract in a policy of insurance, which is nothing more than a contract of indemnity; and therefore, though there was a total loss there, as it might be called, with respect to the subject-matter of the risk insured; yet that having afterwards intervened between the supposed damnification of the plaintiffs by the death of Mr. Pitt, and the action brought, which adeemed the loss, it was held that they could not recover. So here, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss has been incurred in the salvage; that is the real amount of the damnification which the plaintiff is entitled to receive under this contract of indemnity, and that has already been paid by the underwriters.

BAINBRIDGE
v.
NEILSON.

[*344]

GROSE, J.:

This is a case upon which it is said that Lord MANSFIELD in *Hamilton v. Mendez* professed to give no opinion; but it is very clear what his opinion would have been upon the principles laid down by him in the same case: and if there be no express decision on the point, we must resort to principle in deciding it. And one of the best principles upon this subject is that no artificial reasoning shall turn that into a total loss, which in fact is only a partial loss. A policy of insurance is only a promise by the underwriter to indemnify the assured against loss by certain risks: and if so, how can the plaintiff claim a total loss, when in fact the vessel insured *has performed her voyage, and he has only sustained an actual loss of 15*l.* 4*s.* 8*d.* per cent. on the ship, and 13*l.* 11*s.* 5*d.* per cent. on the freight insured. The case

[*345]

† 9 East, 81.

BAINBRIDGE states that which is very material, that the plaintiff had possession of the ship again after the recapture, and before the action brought; that she sustained no damage from the capture, while she continued in the possession of the enemy; and that she has been restored and has arrived at her port of discharge; and that the freight has been received by the owners. What pretence then is there for saying that this is a total loss, where no damage has been done to the ship, and only a trifling expense incurred for the salvage and charges of the recapture? We must look here to the time of the action brought to see whether there has been a total loss of the subject matter to the plaintiff, as he alleges; and it is clear that at that time there was not a total but only a small partial loss.

LE BLANC, J. :

I agree in opinion that there must be judgment for the defendant upon this case, which though new in circumstances is not so new in principle. The main stress of the plaintiff's argument has been, that at the time of the notice of abandonment he had a right to abandon. But there is the fallacy of it. It does not follow that he had a right to abandon because he had a right to give notice of abandonment upon the faith of the intelligence first received. At the time of the capture he had a right to give such notice; but at the time when the notice was actually given the ship had been recaptured and was carried into Lough Swilley in Ireland, a port of the United Kingdom, in the course of her voyage home: and there is no evidence of any damage sustained either by plunder of or by mischief done to the ship, cargo, or crew, which could make it a total loss. It is impossible then to say that the want of knowledge by the assured of the true state of things shall vary the fact, and make that a total loss which is only a partial loss. None of the decided cases of total loss come up to the present; and not even the cases put by Lord MANSFIELD in *Hamilton v. Mendez*. The plaintiff knew of some of the circumstances, but did not know them all. The mere circumstances of capture and recapture will not make it a total loss. It may often happen that intelligence is received which will justify the giving notice of an abandonment; but if circum-

[*346]

stances so turn out, that there is no total loss, it does not follow that the assured would be entitled to insist on his notice. In *M'Carthy v. Abel* the assured was justified in giving notice of abandonment, but circumstances happened afterwards which shewed that there was no loss of the subject matter. So here, circumstances have turned out to shew that only a partial, and not a total loss, has been sustained; though the notice of abandonment were properly given at the time upon the intelligence then received. This case falls in very much with an expression used by the Chief Justice in delivering the judgment of the Court of C. P. in a late case of *Thellusson v. Shedden*,† where he says, “it is true that a capture simply proved establishes a total loss; but when the plaintiff in the same breath proves a recapture, there is an end of the capture and total loss, and the plaintiff is entitled to a partial loss only.” So here, though a capture were proved, yet it also appearing that there was a recapture; unless it be also shewn that, notwithstanding *the recapture, it still continued a total loss, it is only a partial loss. [*347]

BAINBRIDGE
NEILSON.

BAYLEY, J. :

The case has been so fully discussed that I can add nothing to make it more clear. A policy of insurance is only a contract of indemnity, and anything which tends to shew that an assured can recover beyond his indemnity is against the very principle of the contract: and here it would plainly lead to fraud if the plaintiff who has in fact only sustained a partial loss to a small extent, could recover beyond what would indemnify that loss. But it is said, that upon receiving intelligence he had a right to abandon immediately. I agree that it was prudent in him to give such notice at the time, and if things had stood in the same situation he would have been entitled to abandon: but I consider that notice as including this implied condition, that things continued to exist as the plaintiff supposed they did exist at the time when he gave the notice; and if any thing happened afterwards to make that a partial, which at one time was a total, loss, the ignorance of that fact by the assured would not make it a total loss. The

† 2 Bos. & P. (N. R.) 230.

BAINBRIDGE case of *M'Carthy v. Abel* shews that subsequent facts will vary the right of the party to abandon as for a total loss, when ultimately no loss is incurred within the policy. Suppose a capture, and the captors afterwards give up the ship, and she pursues her voyage as before, and the assured receiving intelligence of the capture, but not of the release, give notice to abandon; yet if the voyage be afterwards performed, would that entitle the assured to make it a total loss, when he had sustained no actual loss at all, though the voyage might have been a little delayed? Yet that would shew that circumstances happening after *a total loss once existing may take away the right to abandon. Then if the fact be that at the time of the notice to abandon given, it was not a total, but only a partial, loss, the giving such notice could not entitle him to abandon as for a total loss. By deciding that in all these cases the right of the party to abandon shall depend upon the actual circumstances of the case, and not upon those which are merely supposed to exist at the time, no injustice will be done, and it will make the policy that which it ought to be, and really is, a contract of indemnity.

[*348]

*Postea to the defendant.*1808.
Nov. 22.

HODSON AND MARY HIS WIFE v. SHARPE AND ANOTHER.

[350]

(10 East, 350—354.)

A lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. II. c. 17, for want of being registered; the enactment that "no lease, &c. should be of force but from the time it should be registered," not avoiding the lease as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before.

THE plaintiffs declared in covenant, that one W. Wells, being seised in fee of the demised tenements at Upwell in Norfolk, on the 8th of September, 1798, by indenture of that date, demised the same to the defendants for 11 years, under certain covenants to keep the premises in repair, &c. That Wells afterwards on

the 12th of August, 1801, devised the reversion of the premises to the plaintiff Mary in fee, and died, &c. : and then alleged a breach for non-repair, &c. To which the defendants pleaded, amongst other matters, that the land intended to be demised by virtue of the said indenture, *before the making thereof, was parcel of the 95,000 acres mentioned in the stat. 15 Car. II. c. 17, for draining the Bedford Level and incorporating the adventurers by the name of the governor, bailiffs, and commonalty of the company of conservators of the Great Level of the fens, and giving them a common seal. By s. 8 of which it was enacted that all conveyances by indenture of the said 95,000 acres, or any part thereof, entered with the registrar (one of the officers named in the corporation) in a book to be kept for that purpose, should be of equal force to convey the freehold and inheritance of the same as if by indenture inrolled within 6 months of record at Westminster : and it was further enacted that no lease, grant, or conveyance, &c. of the same (except leases for 7 years or under, in possession) should be of force but from the time it should be entered with the said registrar as aforesaid, &c. And then the defendants averred that the said indenture hath at no time whatever hitherto been entered with the registrar for the time being, appointed by the corporation, in manner and form as required by the said Act ; by reason of which the indenture is of no force. To which there was a general demurrer.

HODSON
v.
SHARPE.

[*351]

Best, in support of the demurrer, contended that the lease, though invalid till registered, as against third persons claiming adversely, was yet binding between the parties themselves, notwithstanding the words of the Act, that " no lease, &c. (except leases for 7 years or under in possession) should be of force but from the time it should be entered with the said registrar : " for that only means of no force as against third persons.

(The Court then said they would hear what could be urged against that construction ; for the general object of this and *other acts of the like kind was to give notice to third persons, and thereby prevent frauds.)

[*352]

Burrell, *contra*, relied on the positive words of the Act,

HODSON
v.
SHARPE.

that no lease (such as that in question) should be of force but from the time of registering it: and referred to *Doe v. Barber*,† where it was held that the lessee of a rectory house, the lease of which had become void under the stat. 13 Eliz. c. 20, by the non-residence of the rector, could not recover in ejectment even against a stranger who had entered without title: the words of that statute being “that no lease shall endure any longer than while the lessor shall be ordinarily resident, &c.; but that every such lease, &c. immediately upon such absence shall cease and be void.”

LORD ELLENBOROUGH, Ch. J.:

[*353]

That was an action against a stranger to the title of the lessor, and therefore the defendant was not estopped from disputing it: but in *Cook v. Loxley*,‡ which was an action for use and occupation by a rector against his tenant of the glebe lands, the defence attempted to be set up was that the rector had been simoniacally presented, which would have avoided his title to the rectory: but the Court agreed *that it was a universal rule, that a tenant should not be permitted to set up any objection to the title of his landlord under whom he held: that this was not a mere technical rule, but one founded in public convenience and policy. Here the lessee has had all the benefit which he could derive under the lease; and now he sets up an objection to it, that it is not registered; which he shall not be permitted to do. The Act no doubt meant for the protection of titles that leases and conveyances within this district should be registered, that every person interested in the inquiry might know in whom the title to any such land was: and therefore as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the Act had not

† 1 R. B. 611 (2 T. R. 749).

‡ 2 R. B. 521 (5 T. R. 4), and vide *Blake v. Foster*, 5 R. B. 419 (8 T. R. 487), and vide *Graham v. Peat*, 6 R. B. 268 (1 East, 244), where one in possession of glebe under a lease void by the stat. 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrongdoer. But

in *Frogmorton v. Scott*, 6 R. B. 477 (2 East, 467), it was held that a rector, whose own lease was avoided by his non-residence, might recover in ejectment against his own lessee. The lease, however, was there held to be void on another ground, as having been made to a spiritual person against the provision of the stat. 21 Hen. VIII. c. 13, s. 3.

been complied with, and relied on it, the legal objection might prevail at law ; but not as between the parties themselves to the lease, between whom the Act was not meant to operate.

HODSON
v.
SHARPE.

GROSE, J. assented.

LE BLANC, J. :

The defendant has enjoyed the land under the lease almost to the end of the term, and now objects that it is of no validity, because it is not registered : but the object of that clause in the Act on which he relies was to take away the priority of the party whose title was not registered, with respect to subsequent claimants whose titles were registered : but it never was intended to operate between the parties themselves, so as to enable a lessee who has enjoyed under it to dispute the lease.

BAYLEY, J. :

[354]

The object of this Registry Act is like that of all others, to protect the title of third persons ; but not to enable the parties themselves to set it up against their own acts. Here too the defendant has enjoyed under the lease during the time in which the breaches of covenant were committed, and therefore, even if the lease were void, I should have been much disposed to have considered that he was liable on his covenant, as an independent covenant : but it is not necessary to decide that point, as the case is clear on the other ground.

Judgment for the plaintiff.

1808.
Nov. 25.

[378]

HUNTER v. PRINSEP AND OTHERS.†

(10 East, 378—395.)

Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of the homeward-bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting *bond fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the shipowners.—Held, that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight *pro rata itineris*. For such form of action for the proceeds of an illegal sale of goods is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, which admits of a set-off, &c.), but does not recognize the right of the vendor so to convert the goods. And here the act of conversion (for such it must be taken to be), being made by the master, who is the general agent of the shipowners; and not, as in *Baillie v. Modigliani*,‡ by the act of a Court of competent jurisdiction; was unlawful, and discharged the claim of the shipowners for freight *pro rata itineris*.

But the plaintiff could not recover against the shipowners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened, as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves.

IN assumpsit, the plaintiff declared in the two first counts against the defendants, as owner of the ship *Young Nicholas*, for not delivering mahogany and logwood, loaded on board that ship, in the Bay of Honduras, upon freight for London, agreeably to the terms of the different bills of lading which had been signed for such goods by the master; but having before the goods arrived at London, without the plaintiff's consent and against his will, sold them, and converted the produce to their own use. The first count stated the promise to have been, to carry the goods on board the ship from Honduras to London, and there deliver them to the plaintiff; the dangers of the seas

† Followed in *Hopper v. Burness* (1876) 1 C. P. D. 137, 142, 45 L. J. C. P. 377, 34 L. T. 528. Discussed by COCKBURN, Ch. J., in

Metcalf v. Britannia Iron Works Co. (1876) 1 Q. B. D. 613.—R. C.

‡ Park, Ins., 8th ed., p. 116.

only excepted. The second count stated the exception to have been of the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever. The third count stated a delivery by the plaintiff to the defendants of 500 logs of mahogany and 100 tons of logwood; and that they, having sold and disposed of them, promised to render to the plaintiff a just and reasonable account of the sale and proceeds, but had *refused to do so. The other counts were for goods sold and delivered, for money had and received, and upon an account stated. The defendants pleaded the general issue, and gave a notice of set-off, in the common form, for freight, work and labour, and money paid. At the trial at Guildhall a verdict was found for the plaintiff, subject to the opinion of the Court on the following facts: the damages (if any) to be settled by arbitration according to that opinion.

HUNTER
v.
PRINSEP.

[*379]

On the 3rd of Sept. 1803 a charter-party of affreightment, under seal, was entered into and executed by the defendants, being owners of the ship *Young Nicholas*, and the plaintiff, as freighter of her, on a voyage from Falmouth to Honduras Bay, to fetch back from thence for the plaintiff a cargo of mahogany, with 60 tons of dye-wood and logwood or fustick, to be delivered at London; the dangers of the seas and other unavoidable casualties always excepted. And by the terms of such charter-party the freight was stipulated and covenanted to be paid by the plaintiff to the defendant, in the following manner, viz. That the freighter should pay to the owners freight for the said cargo at the rate of 12*l.* 12*s.* per ton for mahogany, and for logwood or fustick at the rate of 8*l.* 8*s.* per ton of 20 cwt. at the King's beam, with 1*s.* 6*d.* per ton, in lieu of port charges and pilotage, besides the primage therein specified: such freight, &c. to be paid as follows: to wit, one third part on a right and true delivery of the said homeward-bound cargo, and the remaining two third parts thereof by an accepted bill or bills on the freighter, payable at three months date from such delivery. And the parties reciprocally bound themselves by such charter-party to each other for the performance of the covenants and agreements contained in it, in a penalty *of 8,000*l.* The ship

[*380]

1808.
Nov. 25.

[378]

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But the plaintiff could not recover against the shipowners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened, as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves.

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HUNTER
v.
PRINSEP.

[*379]

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[*380]

HUNTER
v.
PRINSEP.

proceeded to Honduras Bay, where a cargo of mahogany and logwood, amounting to above 200,000 feet, was loaded by the plaintiff on board the ship for London; and bills of lading for different parcels, with such different exceptions as are stated in the different counts of the declaration, were signed by the master of the ship for the delivery of such goods to the plaintiff, paying the before-mentioned freight for the same. The ship thus loaded, and having no other goods on board her, sailed from the Bay of Honduras on her homeward voyage on the 29th of March, 1804; and on the 21st of April following was so damaged in a storm as necessarily to put into Savannah in Georgia to repair: and the master (who was employed by the defendants) sold a part of the mahogany there to pay for the necessary repairs of the ship; but the general average on that occasion has been adjusted and settled between the parties. On the 8th of July in the same year the ship, having been refitted again, put to sea with the remainder of her cargo in the further prosecution of her homeward voyage; but on the next day was captured by a French privateer, and carried towards Guadaloupe. On the 6th of August following she was recaptured off that island by one of his Majesty's sloops of war, and sent to St. Kitt's; where on the 5th of September following she was driven ashore in a hurricane and wrecked; but the then remaining cargo was saved. The wreck and cargo were by order of the Vice-Admiralty Court at St. Kitt's put up to public sale, without the privity or consent of the plaintiff or defendants; except only as such consent may be involved in the fact of the master of the *Young Nicholas* having applied for the said order; he acting on that occasion according to the best of his judgment for the benefit of all *parties concerned. The cargo produced (after paying 1-8th of the proceeds to the re-captors for salvage) 1776*l.* 19*s.* 10*d.* The ship netted about 200*l.*; and the proceeds of both were remitted to and received by the defendants. And this action is brought to recover the proceeds of the goods sold at St. Kitt's and remitted to the defendants, who insist on retaining the whole thereof on account of freight, which they allege to be due *pro ratâ itineris*. The plaintiff, on the contrary, insists, that he is entitled to recover the value of the goods sold at St. Kitt's, without any

[*381]

allowance for freight. The questions for the opinion of the Court were, Whether any freight were payable to the defendants, in respect of the cargo sold at St. Kitt's? If any freight were payable for the goods sold at St. Kitt's, Whether such freight were to be calculated on the proportion of the voyage actually performed in point of time, or distance, or only on the proportionate diminution of expense between the rate of freight from Honduras to London, and the rate of freight from St. Kitt's to London? And also, Whether freight were to be allowed on the quantity of goods so sold, or only in the proportion their neat proceeds, when sold, bear to their prime cost on board, or to what they would have neated if delivered at London? It was mutually agreed, that when the rule had been given by the Court, the result should be settled by the arbitration of William Ludlam of Lloyd's Coffee-house, London, merchant, in conformity to such rule.

HUNTER
v.
PRINSEP.

Marryat, for the plaintiff, contended that no freight at all was payable in respect of the part of the cargo which was wrecked and sold at St. Kitt's, and remitted to the defendants. There is great difficulty in collecting from *the books any rule for ascertaining in what cases freight is due *pro ratâ itineris*; but there is no case of rateable freight established except where the owner of the goods has, in consequence of the misfortune which has impeded the due course of the voyage, prevented the ship owner from forwarding them to the place of their destination by disposing of them himself; or else where some new agreement has been expressly made, or is to be inferred from the circumstances, for the apportionment of the freight. But nothing of the kind is here found.

[*382]

[He referred (*inter alia*) to *Luke v. Lyde*, 2 Burr. 882, and 1 Black. Rep. 190: *Cook v. Jennings*, 4 R. R. 468 (7 T. R. 381).]

Richardson, for the defendants, contended that the special counts could not be supported, and that the true question arose upon the count for money had and received.

[384]

[He referred to *Lutwidge v. Gray*, Dom. Proc. Feb. 1783, Abbott on Shipping, 5th ed. 308; 13th ed. 591; *Baillie v. Modigliani*,

HUNTER v. PRINSEP. K. B. Hil. T., 25 Geo. III. Park, 53† ; *Curling v. Long*, 4 R. R. 747 (1 Bos. & P. 634) ; *Mulloy v. Backer*, 7 R. R. 704 (5 East, 316).]

[387] *Marryat*, in reply, observed that the plaintiff here had exercised no option as to the taking of his goods at St. Kitt's ; but they had been sold, and the money remitted to the defendants, before he had any opportunity of interposing and judging for himself : and this distinguished the present from all the former cases, except *Baillie v. Modigliani*, where the opinion [*388] quoted was not the point *in judgment. * * *

The case stood over for a few days : and now

LORD ELLENBOROUGH, Ch. J. delivered judgment :

[*389] This case, which was argued on Tuesday last, stood over, rather for the purpose of our looking into some of the cases cited, particularly that of *Baillie v. Modigliani*, Park, 53, than from any doubt which the Court entertained upon *the main points of the case now in question. It will be recollected that it was an action of assumpsit, brought by the plaintiff, a shipper of goods on board the ship *Young Nicholas*, of which the defendants were owners. The parties had mutually contracted by a charter-party of affreightment under seal executed between them, for a voyage from Falmouth to Honduras Bay. The defendants were to fetch back from thence for the plaintiff a cargo of mahogany, logwood, &c. to be delivered at London, "the dangers of the seas and other unavoidable casualties always excepted." By the charter-party the freight was stipulated to be paid in particular modes and proportions on a right and true delivery of the same homeward-bound cargo. This right and true delivery of the homeward-bound cargo at the port of its destination never took place ; as the ship, after taking in such cargo at the Bay of Honduras, was first damaged by a storm, and driven into Savannah in Georgia to repair ; was afterwards, in the further course of her voyage, captured by a French privateer ; then recaptured by a King's ship and sent into St. Kitt's, where she was driven on shore in a hurricane and wrecked : but the remainder of the cargo (of which part had been before sold at Savannah for the expense of repairs) was saved ;

HUNTER
v.
PRINSEP.

and upon the application of the captain to the Court of Vice-Admiralty at St. Kitt's for an order for that purpose, was, together with the wreck of the ship, there sold, without the privity or consent of the plaintiff, or of the defendants. The cargo upon such sale neated, after payment of 1-8th salvage to the recaptors, 1,776*l.* 19*s.* 10*d.*, which was, together with the proceeds of the ship, remitted to and received by the defendants. The action was brought by the plaintiff to recover the proceeds of the cargo sold at St. *Kitt's from the defendants, who had so received them. The defendants insisted upon retaining the whole of such proceeds on account of freight, to which they claimed to be entitled *pro ratâ itineris*. The plaintiff insisted upon his right to recover the whole of these proceeds, without making to the defendants any allowance for freight. The declaration in which this recovery was sought contained three special counts *in assumpsit*, founded two of them upon two bills of lading signed by the master, containing the first of them an exception of "the dangers of the seas;" the second, "of the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, navigation," &c. Upon these two special counts the plaintiffs clearly could not recover; both because they contained an express exception for the very perils by which the loss of the voyage was occasioned; and also because the plaintiff, having contracted with the defendants by charter-party under seal, could not charge the defendants in respect to the same subject-matter in virtue of a contract not under seal, and signed by their master only and not by themselves.

[*390]

As to the 3rd count, whether the law would imply any such promise to account for the proceeds of a cargo, wrongfully sold and converted, upon the ground of such conversion only, as is therein stated, is the less material to be considered, as the same merits on the part of the plaintiff are open for discussion on the count for money had and received, and upon which count the question between the parties distinctly arises: which is, whether the defendants have a lien upon and can claim to deduct their freight *pro ratâ itineris* out of the proceeds of the cargo sold at St. Kitt's, and which are now in their hands. *It was contended on the part of the defendants, that the money for which the goods sold

[*391]

HUNTER
v.
PRINSEP.

is a substitution for, and properly represents, the goods themselves: and that as the defendants would, if the goods had subsisted in specie, have had a lien upon them for their freight, and would be entitled to have carried them if they could in the same ship, or to have hired another for that purpose, and so to have earned their full freight: or, if the plaintiff had taken them out of their hands before the voyage was completed, would have been entitled to have claimed freight *pro ratâ itineris* against him: so, now, the plaintiff, having sued for the proceeds in this form of action "for money had and received," has, in virtue of his so suing, adopted and confirmed the act of the master, by which the goods were converted into money, by which the further conveyance of them in the course of the voyage was prevented, and by which of course the full freight of them was prevented from being earned. But the fallacy of the argument on the part of the defendants appears to us to consist in attributing more effect to the mere form of this action, than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money; and takes to the neat proceeds of the sale as the value of the goods; subject of course to all the consequences of considering the demand in question as a debt, and, amongst others, to that of the defendants having a right of set-off, if they should happen to have any counter demand against the plaintiff. But we have been much pressed with the authority of the case of *Baillie v. Modigliani*, as supposed to be similar to the present; and in which Lord MANSFIELD *is stated to have said, "In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was due *pro ratâ itineris*." This however, as every other proposition laid down by a Judge, ought to be understood with particular reference to the facts of the case then before the Court. That was the case of a ship sailing with goods from Nevis to Bristol, which was captured in the course of the voyage, carried into France, and condemned there: but the sentence of condemnation was afterwards reversed, and restitution awarded. The ship and cargo had however in the meantime been sold:

[*392]

but the proceeds of the sale had been paid, as it should seem from the note, to the owner of the goods, deducting the charges of the appeal : and the owner of the goods had out of the money paid the owner of the ship freight *pro ratâ itineris*. Of this payment of freight the owner of goods claimed the reimbursement from his underwriters upon a policy on goods : but it was properly answered on the part of the defendant, and the Court held accordingly, that the insurer on goods was not liable to have the charge of freight thrown upon him, because he had not engaged to indemnify against it : and this was sufficient for the decision of the only question then directly in judgment before the Court. But it appears from the note of that case that Lord MANSFIELD did in that case further hold that freight *pro ratâ itineris* was a charge upon the proceeds of the goods sold in the hands of the owner of the goods to whom those proceeds had been rendered in lieu of his goods. But in what case, and under what circumstances, did Lord MANSFIELD so hold ? Was it in the case of tortious unauthorized sale, as the one now in question must be taken to have been ; particularly since the late case of *Reid v. *Darby* † decided in this court in Trinity Term last ? Or in a case in which the competency of jurisdiction of the several courts which condemned and restored was unquestionable : where if the ship and goods had been restored in specie, the right of the ship owner to earn full freight, by carrying the goods to the delivering port, was entire ; and where the possibility of doing so had only been prevented by the act of the Court or its officers, in making sale of the goods pending the suit, and by no fault on the part of the owner of the ship ? And however just it may be that a substitution of money for goods, made by the authority of a competent tribunal, shall be equivalent to the actual restitution of the goods themselves, as far as respects all interests in and liens upon that fund ; and however reasonable it may be that an owner thus taking the substitute, which requires no further conveyance, should be considered as virtually dispensing with the further duty of the ship owners, which would have remained to be performed if the goods had still continued in specie ; yet, no such dispensation with the

HUNTER
v.
PRINSEP.

[*393]

† *Ante*, p. 246 (10 East. 143).

HUNTER
v.
PRINSEP.

[*394]

duty of further conveyance on the part of the owner of the goods can be implied in a case like the present, in which the further conveyance of them is rendered impossible by an act of the immediate agent of the ship owners themselves, to which he, the owner of the goods, is neither actually nor virtually consenting by himself, or any agent empowered to consent on his behalf; and to which he is not compelled to submit by any regular exercise of legal authority in any quarter whatsoever; and from which he can, according to what is contended for on the part of the defendants, derive no *benefit whatever; inas-much as the *pro ratâ* freight claimed by them exceeds the whole amount of the proceeds of the goods sold. Upon this view of the case of *Baillie v. Modigliani*, compared with the present, it affords no authority adverse to the claims made by the plaintiff in the present action. The principles which appear to govern the present action are these: the ship owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties: and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight: but it was only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay any thing. If the ship be disabled from completing her voyage, the ship owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship owner will not forward them, the freighter is entitled to them without paying any thing. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship owner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The

captain's conduct in obtaining an order for selling the *goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight. The postea must therefore be delivered to the plaintiff.

HUNTER
v.
PRINSEP.
[*395]

K. B. HILARY TERM.

WRIGHT, CLERK, v. SMYTHIES, CLERK.

(10 East, 409—412.)

1809.
Jan. 24.

[409]

Where successive rectors had been in possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appearing that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 Geo. II. c. 36,† and that no conveyance was enrolled according to the 1st section of that Act, nor any disposition of it made to any college, &c. according to the 4th section; held that no presumption could be made of any such conveyance enrolled (which if it existed the party might have shewn), and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed: although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in Balliol College, Oxford.

THIS was an action brought by the present rector of St. Michael's, Colchester, against his predecessor, to recover damages for dilapidations of the rectory-house, and other buildings described. The declaration stated, as usual, the seisin by the plaintiff of the rectory and premises, and that the latter were in a ruinous state. The defendant let judgment go by default as to the rectory-house, and pleaded not guilty as to the residue of the grievance complained of. The property in dispute, consisting originally of a dwelling-house, a stable, *slaughter-house, and other premises, appeared at the trial to have been devised by one Charles Saunders of Colchester, by will dated the 2nd of August, 1754, in the following words: "I give and devise

[*41C]

† See now the Consolidating Act, 51 & 52 Vict. c. 42.—R. C.

WRIGHT
v.
SMYTHIES.

all that capital messuage or dwelling-house, with the stable, slaughter-house, yards, garden, and other appurtenances, now in the occupation of me and S. N. unto my friends G. Wegge, C. Gray, Esq. and the Rev. G. Kilby, all of Colchester, their heirs and assigns for ever : " having before given an estate for life in the premises to his wife. The tenant for life and the three devisees in fee were proved to be dead. No trust was declared, nor any thing else contained in the will which could affect these premises, nor any residuary devise. But it appeared that Kilby, one of the devisees, was rector of this parish, and that he and all his successors, by connivance of the trustees, had let the premises to tenants for their own benefit. The advowson is in Balliol College, Oxford. On these facts Macdonald C. B. was inclined against the plaintiff's right to recover the damages for the dilapidation of the buildings in dispute ; considering that though from the length of time that the successive rectors had been in the receipt of the rents of these premises, it would have been presumed, had nothing appeared to the contrary, that the property had been acquired to the rectory by some legal means ; yet as the manner in which it had originally been acquired was shewn, it appeared that the fee was either in the heir of the surviving joint-tenant, or in the devisee or alienee of such survivor ; or in the heir at law or devisee of the testator, if the devise were void as being made collusively to evade the Statute of Mortmain. However, the learned Judge permitted the inquiry to proceed as to the amount of these dilapidations, and a verdict was found for the plaintiff for 150*l.* the estimated amount of *the dilapidation of the rectory-house ; and leave was given to the plaintiff's counsel to move to add a further sum of , being the amount of the dilapidation in respect to the premises in question, if the Court should be of opinion that he was entitled to recover for those.

[*411]

Nolan accordingly applied for a rule for that purpose in last Michaelmas Term, and stated the objection made at the trial on the part of the defendant, as to the premises in dispute ; that this was a void devise within the Statutes of Mortmain : to which it was answered that as the rectory belonged to Balliol

WRIGHT
v.
SMYTHIES.

College, it was within the saving of the 4th section of the stat. 9 Geo. II. c. 36, which confirms dispositions of lands, &c. in trust for either of the two Universities or the Colleges thereof: for which *The Attorney-General v. Tancred*† was cited. And it was contended that as the successive rectors of the parish for above 50 years past had had possession of these premises, a conveyance, if necessary, would be presumed from the trustees to the use of the College; and that the plaintiff, the present rector, could not be supposed to be in possession of the title deeds of his patrons, so as to produce them in evidence. And he referred to *Griffin v. Stanhope*,‡ where it was said in argument, and not denied, that “if a parson shew that for 200 years certain land was parcel of his glebe, it is not therefore of necessity that the other should produce a confirmation from the patron and ordinary; for the continuance of the possession makes it intenable to be according to law at the time it was made.” So in *Crimes v. Smith*,§ though the original instrument of impropriation of a vicarage *anno 22 Ed. IV., with condition that it should be endowed, was shewn by the defendant, and that it never had been endowed, and therefore the impropriation was void; yet as during all the time a vicar had been presented, admitted, instituted and inducted, as one rightfully endowed, it was resolved by all the Court that it should be presumed that the vicarage in respect of continuance was lawfully endowed.

[*412]

Garrow and *Marryat* now shewed cause; and referred shortly to the learned Judge’s report, as decisive of the question; the devise being absolute upon the face of it, and no proof of any conveyance enrolled having been made by the devisees or any of them to the rector and his successors, without which no title could be derived to them since the stat. 9 Geo. II. c. 36, s. 1, and which, if it existed, the plaintiff had necessarily the means of shewing. And that in the absence of such proof, the title being shewn to be out of the rectors since the statute, no presumption could be made in their favour in express contradiction to the provisions of the Act.

† Ambl. 351.

‡ Cro. Jac. 456.

§ 12 Co. Rep. 4.

WRIGHT
v.
SMYTHIES.

The COURT (in the absence of Lord Ellenborough, who was ill) were clearly of this opinion; and *Shepherd*, Serjt., who was to have supported the rule, yielded to that opinion, without arguing the case.

Rule discharged.

1809.
Jan. 25.

BOWDEN v. VAUGHAN.

(10 East, 415—416.)

[415]

A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship, as to the time of her sailing, being made *bonâ fide* upon probable expectation, does not conclude him.

THIS was an action upon a policy of insurance on goods at and from Lisbon to London. Previous to the effecting of the insurance a letter had been received by the plaintiff from his correspondent, dated Lisbon, 27th of October, 1807, in which the writer advises him that he had consigned to him 1828 hides by the *Almirante Nelson*, which were to be insured; stating that she was a Portuguese ship, and would sail in a few days. This letter was not shewn to the underwriters at the time of subscribing the policy; but the broker represented that the ship was to sail in a few days: and he said upon his examination at the trial at Guildhall, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected; the French army marching to the attack of Portugal being then daily expected at Lisbon. There was no doubt, therefore, of the materiality of the representation: and in fact the vessel did not sail till the 29th of November, and was stopped by the enemy on the 30th before she left the Tagus. Lord ELLENBOROUGH, Ch. J. left the case to the jury; advising them to consider that the person by whom the representation was made was the owner of goods, who could only speak of the sailing of the vessel from probable expectation; and that if such representation were made *bonâ fide*, it should not conclude him.

[*4:6] And the jury, being of opinion that the *representation had been made *bonâ fide* on probable expectation, found a verdict for the plaintiff.

Park now moved for a new trial, on the ground that no such distinction appeared in any of the cases, between a representation as to the time of sailing made by the owner of the goods, and one made by the ship owner; and that the effect of it with respect to the underwriter was the same, whether it proceeded from the one or the other. But

BOWDEN
v.
VAUGHAN.

The COURT were of the same opinion with the Lord Chief Justice at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must from the nature of the thing be considered only as a probable expectation, he having no control over the event.

Rule refused.

THOMASON, JOINTLY WITH HIPGIP, PEARSON, AND
HODGES, ASSIGNEES, UNDER SEPARATE COMMISSIONS,
OF UNDERHILL AND GUEST, BANKRUPTS, v.
FRERE AND OTHERS.

1809,
Jan. 25.

[418]

(10 East, 418—427.)

When a partner becomes bankrupt, all his authorities to bind the firm by dealings in the ordinary course of business, are deemed as having been determined by the act of bankruptcy.† So that two out of three partners having without authority of their firm drawn a bill upon the firm to their own order, and having indorsed the bill subsequently to an act of bankruptcy by each of them, followed by commissions of bankruptcy, it was held that the indorsement did not bind either the property of their assignees in bankruptcy or of their solvent partner.

THOMASON, Underhill, & Guest were partners in trade at Birmingham; to whom the defendants, bankers at the same place, advanced money from time to time. On the 1st of June, 1807, the balance due to the defendants was 1,800*l.*, which was afterwards increased; and Thomason, being then resident at Copenhagen, where he has ever since continued, the defendants applied for security to Underhill & Guest; who thereupon by deed of that date, executed by them only, and without any authority from Thomason, but purporting to bind him also,

† See Lindley on Partnership, 5th ed., p. 667; Partnership Act, 1890, s. 38.—B. C.

THOMASON
and HIPGIP
and Others.
v.
FREERE.

[*419]

assigned to the defendants certain scheduled debts due to the firm of Thomason, Underhill, & Guest, and amongst others a debt for 1,450*l.* (the sum now in dispute) from Gamble & Co. in America. On the 3rd of October, 1807, Underhill & Guest received a letter of advice addressed to their firm from Gamble & Co. (who were ignorant of this assignment) desiring them to draw a bill on Gamble & Co.'s agents Dunlop & Co. in London for the amount of their debt of 1,450*l.*; which bill was accordingly drawn at two months, and was accepted by Dunlop & Co. on the 8th of October, and returned to Underhill & Guest at Birmingham; and on the 11th Guest, with the assent of Underhill, indorsed and delivered it over to the defendants, who had applied for it, and they received payment of it on the 6th of December. On the 7th of October, 1807, Underhill & Guest committed acts of bankruptcy; on the 19th separate commissions of bankrupt were taken out against them; and on the 26th they were declared bankrupts, and the plaintiffs (Hippip, Pearson, & Hodges) were chosen their respective assignees. And those assignees joined with Thomason, the remaining solvent partner, to bring this action for money had and received, in order to recover back the said sum of 1,450*l.* so paid to the defendants by Underhill & Guest after their bankruptcy, by virtue of the deed of assignment executed before by those two partners for themselves and their absent partner Thomason. And it further appeared that at the time of the bankruptcy, and at the trial of this cause, the partnership firm of Thomason, Underhill, & Guest was indebted to the defendants in a larger amount than 1,450*l.* for which this action was brought. Under these circumstances, Grose, J., before whom the cause was tried at Warwick, principally on the consideration that the partnership firm of Thomason, Underhill, & Guest, whose interests were represented by the respective plaintiffs, was indebted to the defendants in a larger sum than that sought to be recovered, nonsuited the plaintiffs. Whereupon a rule *nisi* was obtained in the last Term for setting aside the nonsuit, and for a new trial.

It was now agreed on all hands, that Underhill & Guest had no authority to bind their absent partner Thomason by deed; and that the bill having been indorsed and delivered to the defen-

dants by the bankrupt partners, *after acts of bankruptcy committed by them, would not bind their assignees, whose title would relate back, so as to affect the shares of the two bankrupts. The remaining questions were then resolved into these ; first, whether the payment of a partnership debt made by the two partners after acts of bankruptcy committed by them, but before any commission issued thereon, would bind the solvent partner abroad : and if not, 2ndly, whether this action brought in the joint names of the solvent partner and the assignees of the others to recover the whole could be maintained, when, as against Thomason at least, the defendants were entitled to retain this money ; and when the firm of Thomason, Underhill, & Guest, which still (it was said) remained solvent, and was represented by the several plaintiffs in this action, was now indebted to the defendants in more money than was sought to be recovered from them.

THOMASON
and HIRGIP
and Others

v.
FREEE.

[*420]

[The rule having been argued:]

GROSE, J. : †

[425]

It struck me at the trial that the defendants, to whom the firm of Thomason, Underhill, & Guest, represented by the several plaintiffs in this action, was indebted in more money upon the balance of accounts than was sought to be recovered against them in this action, had a right to set off their demand ; but from the arguments which have been adduced I now think that if the contrary be not established, it is at least rendered so doubtful that there ought to be a new trial, in order to have the case more fully heard, and the questions, which are of consequence, more distinctly brought before the Court, either upon a special verdict or a case reserved.

LE BLANC, J. :

I agree that the cause should go to a new trial. It requires further time and attention to separate the facts and the law ; and if the defendants be so advised they may apply for a special verdict. As to the form of the action I have no doubt : two out of three partners commit separate acts of bankruptcy, and from

† Lord Ellenborough, Ch. J., was indisposed and absent.

THOMASON
and HIRGIP
and Others

v.
FREEZE.

[*426]

that time the partnership property is by operation of law vested in the assignees of Underhill, and in the assignees of Guest, and in Thomason the other partner. After the acts of bankruptcy committed by Underhill & Guest, followed up as they were by commissions and assignments, they ceased to have any control or disposition over the joint property; and therefore their indorsement of the bill to the defendants, after such acts of bankruptcy, was made by persons having no authority to dispose in that manner of the partnership fund or property; and the present plaintiffs, in whom by operation of law the whole property *was vested from that time, are entitled to recover back the money received on the bill as money received to the use of Thomason and of the respective assignees. And then the question is, Whether the defendants can set off a demand which they have upon the three partners to a greater amount, against the claim for this money which was received by the defendants, not to the use of those partners, but to the use of Thomason and of the several assignees of Underhill & Guest? It appears to me at present that they cannot set it off; but the case should go to another trial in order to have it more solemnly considered.

BAYLEY, J. :

I am of the same opinion. The defendants claim to retain this money under an indorsement, by Guest after his bankruptcy, of this bill which was drawn before by the firm on the correspondents of Gamble & Co. for a partnership debt. And I take it to be now clear that where one of several partners commits an act of bankruptcy, which is afterwards followed up by a commission and assignment, he has no longer any property in the partnership effects, but the property is from the time of such act of bankruptcy in his assignees by relation and in the solvent partners. The case of *Hague and others, Assignees of Anne and Isaac Scott, v. Rolleston*,† is an express authority upon this point. There one of two partners, after an act of bankruptcy committed by him, sent to a joint creditor a bill of parcels of goods which he had just before, unknown to the creditor, deposited in a warehouse in his name, and who immediately after the act of bank-

† 4 Burr. 2174.

ruptcy took possession of and sold the goods in part payment of his demand: and the other solvent partner having afterwards become bankrupt, the assignees under *a joint commission against both brought their action of trover against the creditor, and recovered the whole value of the goods; on the ground that when they were delivered by the joint trader who had committed the first act of bankruptcy, he was no longer to be considered as a partner so as to bind by his act the property of the other. So here, at the time of the indorsement of the bill, Underhill & Guest had no control over the partnership effects; and the defendants could not acquire the property in the bill from those who had no control over it. That begets the second question, Whether if persons wrongfully get possession of the property of others, they can, when sued for it, set off a prior demand upon the same parties in right of whom the action is brought? That must be determined by reference to the statutes of set-off: but those only apply to cases where there are mutual debts and credits. Now the defendants never could have sued Thomason and the assignees of Underhill & Guest for this debt; for their demand was against the partnership firm of Thomason, Underhill, & Guest. The case therefore is not within the words, nor is it within the spirit of the Acts.

THOMASON
and HIGGIN
and Others
v.
FREERE.

[*427]

Rule absolute.

DOE, ON THE SEVERAL DEMISES OF ELIZABETH ANNE
COX, AND J. KAY, v. DAY.

(10 East, 427—431.)

1809.
Jan. 25.

[427]

Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated in fact on the 17th of February, 1802, *habendum* from the 25th of March next ensuing the date thereof, is good if not executed and delivered till after the 25th of March; for it then takes effect as a lease in possession with reference back to the date actually expressed.

THIS was an ejectment, tried before Lawrence, J. at Gloucester, to recover certain freehold and leasehold lands in the parishes of Rodmarton and Supperton, which *the defendant claimed under a lease made by Charles Wesley Cox,

[*428]

DOE *ex Cem.* deceased, the father of E. A. Cox, who was entitled to recover
 COX the freehold, and Kay, her trustee, the leasehold, if the lease
 v. made by her father were not good.
 DAY.

By indentures of lease and release of the 8th and 9th of July, 1790, in pursuance of an agreement made previous to the marriage of C. W. Cox and Anne his wife, the freehold premises were limited to Charles Cox, the father, for life, remainder to C. W. Cox, the son, for life, remainder to his first and other sons in tail, remainder to his daughters in tail: with a power for the tenants for life to demise the premises for any term not exceeding 21 years in possession, and not in reversion, or by way of future use. And the leasehold, which was held under one of the prebendaries of Salisbury, was conveyed to trustees, on trust to permit the tenants for lives to receive the rents, and at their request to make underleases of the premises in like manner. Charles Cox being dead, a lease was drawn, dated the 17th of February, 1802, purporting to be a demise from C. W. Cox to the defendant of the freehold and leasehold in question, *habendum* from the 25th of March next ensuing the date hereof, for 21 years, at the yearly rent of 800*l.*: but in consequence of some difference between C. W. Cox and the defendant, the lease was not executed by C. W. Cox till the 27th of April, 1802. Whereupon the learned Judge directed the jury to find a verdict for the plaintiff for the whole of the premises, with liberty for the defendant to move the Court to confine the execution to the leasehold premises in case they should be of opinion that the lease, as to the freehold, did not take effect in reversion, or by way of future use; thinking that, as to the leasehold, the defendant had no right at law, inasmuch as at the time of

[*429] *making the demise the legal estate was not in C. W. Cox, but in his trustees.

Abbott accordingly moved in last Michaelmas Term to have the verdict for the plaintiff entered for the premises included in the prebendal lease only; on the ground that the lease of the freehold only took effect from the execution and delivery of the deed; which being after the 25th of March, 1802, to which the *habendum* referred, the demise would operate from a day then

past, and not in reversion or by way of future use : and that the words of the *habendum*, “from the 25th of March next ensuing the date hereof,” would refer to the actual date before mentioned, namely, the 17th of February, 1802, and not to the day of the delivery. The inrolment of a bargain and sale under the stat. 27 Hen. VIII. c. 16, within six months is reckoned from the date, and not from the delivery of the deed. Shep. Touch, 221. And though, says Lord Coke,† where the indenture has a date, and is delivered after, it shall take effect to pass from the bargainer from the delivery ; for then it became his deed ; and not from the date : yet the deed must be inrolled within six months after the date. And in *Butler v. Fincher*,‡ he said that if the lease (which was of a freehold, *habendum* from the day of the date) had been delivered after the first day, it would clearly have been good. Then in *Clayton’s* case,§ the distinction was taken between a demise from henceforth, which refers to the delivery of the indenture, and from the date, or day of the date, which shall be taken to be the actual date. And *Hedley v. Joans*|| makes the *same distinction between a release of all demands until the making of the release, and until the date thereof.

DOE ex dem.
COX
v.
DAY.

[*430]

Williams, Serjt., *Puller*, and *Hall*, now opposed the rule :

This is a lease under a power to demise in possession, and not in reversion ; which is to be construed strictly ; and here the lease upon the face of it purports to grant a future interest. It is no answer to say that the deed not having been executed till after the 25th of March, 1802, it did not take effect before ; for if the day of the delivery be considered in law as the true date, the lease would still be reversionary, as the *habendum* from the 25th of March next ensuing the date would then refer to the 25th of March, 1803.

(LE BLANC, J. : That is assuming that the day of the date and the day of the execution of the lease mean the same thing.)

It does not say from the day of the date, but from the date. The date of the deed is quite immaterial ; it takes its effect only

† 2 Inst. 674. ‡ 2 Bulstr. 306. § 5 Co. Rep. 1. ¶ Dy. 307, a.

DOE *ex dem.* from the delivery. In *Pugh v. The Duke of Leeds*† Lord
 COX
v.
 DAY. MANSFIELD said that the date of a deed means the day of its
 delivery. So in *Goddard's case*.‡ And if the date be to be
 reckoned from the delivery for one purpose, it cannot be
 reckoned from a different time for another purpose. The
 authorities cited by the plaintiff's counsel went upon the con-
 struction of the particular words of the statute of enrolments.

Dauncey and Abbott, contra, were stopped.

GROSE, J. : §

[*431] We must construe the words of the instrument, if possible, *ut
 res magis valeat quam pereat*, *according to the rule of construc-
 tion laid down in *Pugh v. The Duke of Leeds*. Therefore
 though the lease took effect to pass the interest only from the
 delivery, which was not till after the 25th of March next ensuing
 the date, yet the period of its commencement will then have
 reference back to the actual date; which will cure every
 objection.

LE BLANC, J. :

This is a technical objection, in order to give effect to which
 we must insert in the instrument a constructive date, which will
 avoid it, in the place of an express date of the 25th of March,
 1802, the retaining of which will make it good with reference to
 the time of the actual execution of the lease on the 27th of April
 in the same year: but to put such a construction upon it would
 be contrary to all the authorities.

BAYLEY, J. agreed; and added that what was said by Lord
 MANSFIELD in *Pugh v. The Duke of Leeds* was with reference to a
 case where the deed was delivered on the day of the date.

Rule absolute.

† Cowp. 720.

‡ 2 Co. Rep. 5.

§ Lord Ellenborough was absent
 from indisposition.

KNILL *v.* WILLIAMS.

(10 East, 431—437.)

1809.
Jan. 26.

[431]

A promissory note for 100*l.* payable to the plaintiff or order, and originally expressed to be for value received generally, being altered the next day upon the suggestion of one of the parties by the addition of the words "for the good will of the lease and trade of Mr. F. K. deceased," requires a new stamp; such words being material, and not having been originally intended to be inserted and omitted by mistake.†

THE plaintiff declared on a promissory note, dated Hereford, 1st April, 1807, by which nine months after date the defendant promised to pay to the plaintiff, or order, 100*l.*, for value received for the good will of the lease and trade of Mr. F. Knill deceased; and also on the *common counts. At the trial before Le Blanc, J. at Hereford a stamped note was offered in evidence, corresponding in its terms with the note in the form declared on; but it appeared on the examination of the subscribing witness to the note, that the words in italics were added by consent of both parties the day after the note, the body of which was drawn by the witness, had been signed and delivered by the defendant to the plaintiff, without any new stamp; and that the witness, who had drawn the note the day before in the presence and under the direction of both parties, was not instructed to insert those words at the time.

[*432]

[The judge at the trial rejected the evidence, and the plaintiff was consequently nonsuited, with liberty to move to set aside the nonsuit, and by consent to enter a verdict for the plaintiff for the amount of the note, if the Court should be of opinion that the note was receivable in evidence. The question as to the admissibility of the evidence having been subsequently argued upon a rule granted pursuant to the leave reserved, the following judgments were pronounced:]

LORD ELLENBOROUGH, Ch. J. :

[435]

The first inclination of one's mind is always to support an instrument where the transaction is fair; but when we find so material an alteration as this, made after the instrument has

† B. of E. Act, 1882, sec. 64, and sec. 97 (3). See *Suffell v. Bank of England*, C. A. (1882) 9 Q. B. D. 555, 573, 51 L. J. Q. B. 401, 47 L. T.

146. And compare *London and Provincial Bank of England v. Roberts*, (1874) 22 W. R. 402.—B. C.

KNILL
v.
WILLIAMS.

been issued, I do not know where we should stop if this could be sustained. If a bond, for example, were conditioned for the payment of money generally, could it afterwards be introduced by way of recital that the money had been advanced out of a particular fund; which might afterwards be made use of as evidence for other purposes. Now here the defendant Williams was originally liable on the note for value received generally, without specifying in what that value consisted; and the effect of the alteration is to narrow the value from value received in general to the value expressed; which I cannot say is not a material alteration. And this is not like the case of *Kershaw v. Cox*†, where by mistake, as it appeared, the bill had not been drawn according to the intention of the parties at the time, and which was brought back the next day to the drawer to have the imperfect execution of it perfected. But this is a case where the note was originally drawn in the manner then agreed upon; and it afterwards occurred *to one of the parties that the particular account on which the note had been given should be inserted in it; and which was done the next day according to his desire. This he might have required as evidence for him against the other party of the true consideration of the note; or if he wished to restrain its circulation at large, to put it upon those who took it to inquire whether that consideration had existed. The alteration was made on the following day; and if it might have been done then, there is no reason why it might not be done at any subsequent time: and if in this instance, it may be done in other instances. Such an alteration therefore cannot be admitted without a new stamp.

[*436]

GROSE, J.:

The question is, whether the alteration introduced made it a different note: if it be material, it is a different note: and it certainly is material; for it points out the good will and trade of F. Knill as the particular consideration for the note, and puts the holder upon inquiring whether that consideration had passed. The objection may press hard on the plaintiff, and one cannot but be sorry that the justice of the case as between these parties is defeated; but the very alteration shews that the parties them-

† 3 Esp. 246.

selves were not satisfied with the note in its original and general form, but the particular consideration was required to be pointed out. This made it another note, and required a new stamp ; for want of which, it could not be received in evidence.

KNILL
v.
WILLIAMS.

LE BLANC, J. :

If I had thought that there was any evidence on which the jury might have found that the words afterwards added had been originally intended to have been inserted, and were omitted by mistake, I should certainly *have left it to them so to find ; the case of *Kershaw v. Cox*† being then perfectly fresh in my mind : but according to my recollection of the evidence, it was impossible for them to draw that conclusion from it. The opinion which I delivered in *Kershaw v. Cox*† can only be supported on the ground that the alteration there made in the bill the day after it was negotiated was merely the correction of a mistake made by the drawer of it, in having omitted the words “or order,” which it was intended at the time should be inserted ; for the alteration there made was a very material one. But there was strong evidence in that case to shew that the omission of those words was by mistake ; for it was intended to be a negotiable note, and was immediately afterwards indorsed as such ; considering that it had been drawn payable to order ; and as soon as the omission was discovered it was rectified by the proper parties. Here the alteration was plainly an afterthought : and then it brings it to the question whether it be a material alteration ; of which there is no doubt, for the reasons which have been assigned by my Lord and my brother. Then being a material alteration, and one made upon a subsequent agreement the next day, there ought to have been a new stamp.

[*437]

BAYLEY, J. :

The case of *Master v. Miller* decided that an alteration in a material part of a bill after it has issued makes a new stamp necessary : and this was a material alteration ; for it was evidence of a fact, which if necessary to be inquired into must otherwise have been proved by different evidence.

Rule discharged.

1809.
Jan. 27.

DOE, ON THE DEMISE OF THOMAS THORLEY, v.
THOMAS THORLEY THE ELDER, AND BOOTH.

[438]

(10 East, 438—446.†)

One devises all his freehold estate to his wife during her natural life, “and also at her disposal afterwards to leave it to whom she pleases:” held that this only gave her a power to leave it by will; and therefore that a disposition of it by feoffment in her lifetime was void.

In ejectment for a messuage and seven acres of land in the parish of Dilhorn in Staffordshire, the lessor of the plaintiff claimed as grandson and heir-at-law of John Thorley, who died about 21 years ago, having first made his will, dated the 18th of November, 1786, whereby he devised to his wife Mary Thorley “all his personal estate, and likewise all his freehold estate, during her natural life, and also at her disposal afterwards to leave it to whomsoever she pleased;” and made her sole executrix. The defendants claimed under a feoffment from the said Mary Thorley, who is since dead, made on the 28th of May, 1787, after the death of her husband; whereby, in consideration of 20*l.*, she conveyed to her second son Thomas Thorley, the defendant, a house built by him upon some of the land comprehended in her husband’s will; and afterwards made her will, dated the 11th of July, 1789, in these words: “I leave to my daughter Mary Thorley all my freehold and personal estate, goods and chattels, and all that I have, for her natural life; and at her death, I leave to my son Thomas Thorley the house and ground which I now am possessed of for the care and management of my daughter Mary Thorley: and in case my son Thomas should die before my daughter Mary, then his eldest son John Thorley to take the care and management of the same. I leave to my son John and to my grandson Thomas Thorley 1*s.* to be paid by my son Thomas Thorley. Likewise I desire my son Thomas Thorley to pay all my debts and funeral expenses at my death; and I appoint *R. Willock and J. Dann my executors.” Mary Thorley the mother and her daughter Mary are both dead. The house mentioned in the will of Mary Thorley was part of the premises contained in the will of her husband. And it was contended at the trial before Lawrence, J. at Stafford,

[*439]

† Dist. *Humble v. Bowman* (1877), 47 L. J. Ch. 62, 64.

that the defendant was not entitled to the house conveyed by the feoffment, inasmuch as Mary Thorley had no power to dispose of the lands left her by her husband in any way but by her will, and not by any instrument to operate in her lifetime: and the learned Judge was of that opinion; thinking that the word "leave" pointed at a testamentary disposition. And as to the other house mentioned in Mary Thorley's will, it was contended that her will was not to be taken as an execution of the power, as it did not refer to the power: but the learned Judge thought otherwise; and directed the jury to find their verdict for the plaintiff as to the premises mentioned in the feoffment; giving the defendant liberty to move to enter a nonsuit if the Court should be of opinion that the feoffment was a good execution of the power: for which the defendant's counsel relied on *Tomlinson v. Dighton*,† where one devised land to his wife for her life, and then to be at her disposal to any of his children: and a conveyance made by the wife (and her second husband) by lease and release and fine to a trustee in fee, to the use of herself for life, remainder to her daughter in tail, remainder to her son in fee, was adjudged a good execution of the power. And on 3 Leon. 71, pl. 108, there cited; where the devise was to the wife for life, "and after her decease she to give the same to whom she would:" and this power also was held to be well executed by a grant of the reversion in her lifetime. And these *cases were again mentioned when the rule for entering a nonsuit was moved for in the last Term.

DOE ex dem.
THORLEY
v.
THORLEY.

[*440]

[After argument upon the rule:]

LORD ELLENBOROUGH, Ch. J.:

[442]

This question arises on the construction of a power; and if by construing it liberally be meant that the Court should give to the party more latitude in the execution of the power than the person who created it intended to give, I entirely disclaim any such authority. If we can collect the meaning of the devisor, we will obsequiously give it effect; and more particularly if that which appears to us to be the true construction of the words be more for the benefit of the party for whose sake the power was

† 1 P. Wms. 149, and S. C. 10 Mod. 31.

DOE ex dem.
THORLEY
v.
THORLEY.
[*443]

created, than that which is said to be the more liberal construction. The devisor first gives to his wife an estate for her life, and *then he says that it shall be “at her disposal afterwards to leave to whomsoever she pleases.” In common understanding the word “leave” must be taken to apply to that sense of it in which a person making his will would naturally use it, namely, by a testamentary disposition. And this mode of disposing of the property was most for the benefit of his widow, whom he intended to benefit by confiding to her the power of disposing of his property after her death. It might have occurred to him that if he gave her a power which was to be executed by deed in her lifetime, she would thereby divest herself of all control over the property, and be disarmed of her power to attract respect up to the moment of her death from those who expected to be objects of her bounty : whereas by confining her to a disposition of the property by her will, which would be ambulatory until her death, it would operate more beneficially for herself by attracting respect and protection to her to the end of her life. I am not prepared to say that this is a power so annexed to her estate that after disposing of that, she could not still have executed the power : but I found my opinion on the word “leave,” which shews that the testator meant the power to be executed by will ; and differs this case from *Tomlinson v. Dighton*, where, after the life estate of the widow, the property was left at her disposal ; and the determination that such disposition might be by deed in her lifetime violated no received sense of those words. In the case in *Leonard* the power conferred on the wife was after her decease to give the estate to whom she would ; which might import something of which the party was to divest herself presently : but the word “leave” as applied to a disposition of property emphatically means by will.

[444] GROSE, J. :

This is simply a question of intention, as to what the testator meant, after giving his widow a life estate in this property, by directing that it should be “at her disposal afterwards to leave it to whomsoever she pleased :” whether he meant to give her a power to pass it away by feoffment in her lifetime, or only by

DOE ex dem.
THORLEY
v.
THORLEY.

her will, which would retain to her the control over it to the end of her life. It might have occurred to the testator that he was giving a power over his property to be executed by one who might be under coverture again; and therefore he might well intend to direct the disposition of it by such means as would at all events secure her control over it in case she survived her second husband, and to the end of her life, and that she should not be able to debar herself of this control by any act during her life; which would be the case if this feoffment could take effect. It was meant to protect her against her own act; which could only be done by preventing her from disposing of the property during her life: and therefore the testator has said that it shall be at her disposal afterwards to leave it to whom she would: and we can only carry his apparent intention into effect by saying that she could only leave it by a testamentary act. If the case had rested upon the words "at her disposal," as in *Tomlinson v. Dighton*, that might as well have been by common law conveyance as by will: but the word "leave" points to a testamentary disposition only; and it is clear that the testator meant her to pass the estate by her will only, which she might revoke at any time of her life afterwards.

LE BLANC, J. :

I am of the same opinion. The case is clear upon the first point, and therefore it is not necessary to give an opinion on the other; though if it were necessary, *there is not much difficulty in it. The property is "to be at her disposal afterwards." If the words had rested there, any instrument disposing of it after her death would have been within the words of the power; according to the case of *Tomlinson v. Dighton*, and that in *Leonard*.† But the words which follow, "to leave it," &c. control the generality of the preceding words, and are the same as if he had said "to leave it by her last will." It is argued that she might leave it as well by other instruments as by a will; but I do not think that the word "leave" has so extended a signification; it applies only to a disposition by will. A

[*445]

† 3 Leon. 71, pl. 108.

DOE ex dem.
THORLEY
v.
THORLEY.

person may be said to dispose of property by deed as well as by will ; but no one is ever said to leave property by deed. This mode of construing the words of the power is also much more than the other in favour of the person meant to be benefited by it : for thereby she would retain her power of disposing of it to the end of her life, and secure to herself all the time more influence and respect. The word “ then ” in *Tomlinson v. Dighton* could not be meant to apply to a disposition of the property after her death, but must refer to some instrument to be executed in her lifetime, and therefore only marked the period when the disposition was to take effect. The same may be said of the case in *Leonard* ; and the word “ give ” there used applies as well to a gift by deed as by will.

BAYLEY, J. :

The word “ leave ” as applied to the subject matter *primâ facie* means a disposition by will ; and if that be the ordinary sense of the word, we who are now to decide upon the meaning of the testator must say that he meant to use it in that sense, unless something appears to shew that he used it in a sense different from the ordinary *one : but nothing of that sort does appear. And this construction is confirmed by the consideration that if the widow were confined to dispose of it by will, she would retain the power of disposition over it to the end of her life ; but if she might dispose of it by deed, having once conveyed it away, she would be precluded from the exercise of any further disposing power for the remainder of her life. Then if this be a power to dispose of the property only by will, that being different from a power to dispose of it by deed, the power was ill executed, and the lessor of the plaintiff is entitled to recover.

[*446]

Rule discharged.

HILL v. SMITH.

(10 East, 476—489 ; sequel of S. C., in error, 4 Taunt. 520—533.)

1809.
Jan. 31.

[476]

Where the corporation of Worcester had for above forty years received toll upon corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held by the King's Bench sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market in the manner now practised between forty and fifty years ago.

Rule for a new trial accordingly discharged.

But on the final judgment of the Court being brought up, in error, to the Exchequer Chamber, held there that such prescription for toll on goods sold by sample in the market and afterwards brought into the city to be delivered, could not be supported.

TRESPASS for taking wheat and other grain of the plaintiff, at Droitwich in the county of Worcester, and converting the same to the defendant's use. To which the defendant, in addition to the general issue, pleaded several special justifications. 1. As to taking 30 pints of wheat, part, &c. ; that the city of Worcester is an ancient borough or city, and the citizens or burgesses have immemorially been a body corporate by different names till the charter of the 19 Jac. I. incorporating them by the name of the mayor, aldermen, and citizens of Worcester; and that the said citizens or burgesses, from time immemorial until that charter, and the mayor, aldermen, and citizens since, have had and held and *been used and accustomed, and of right ought, to have and hold a market in the said borough or city, in a certain place there, now called the Corn-market, on every Saturday (except when Christmas-day happens on a Saturday) for the buying and selling of wheat and other grain there; and during all the time aforesaid have, at their own costs and charges, repaired the highways and pavements of the said corn-market, and other highways and streets in the said borough or city, for the more convenient bringing of grain into the said borough or city to be

[*477]

HILL
v.
SMITH.

[*478]

sold there; and by reason of the premises have immemorially taken, &c. for their own use a certain reasonable toll, viz. one pint of wheat, corn measure, for every 3 bushels of wheat, reckoning the same according to the quantity sold and delivered as such in the said city or borough, sold in the said market by sample, and afterwards brought into the said borough or city to be delivered to the buyer, to be paid by the seller of such wheat, except where the seller of such wheat has been a freeman of the said city or borough, and except wheat of any person otherwise exempt by law from the payment of the said toll, and except wheat that had before paid toll in any market or fair in the said borough or city: and in case of non-payment of such toll after reasonable request, &c. the corporation have immemorially taken a reasonable distress for the same, &c. The plea then averred that the plaintiff on a certain market day sold to one T. Hull 31 bags as for 3 bushels of wheat in each bag, by sample, to be delivered in the said city, which said wheat, of which the said 30 pints were parcel, &c. was afterwards brought to be delivered to T. Hull in the said corn-market in the said city, &c. (negativ-ing its coming within any of the exemptions). That the defend-ant, as servant of the corporation, *requested the plaintiff, then and there having the possession of the said wheat, to pay toll for the same, being in the said market place, and within the said city; and on his refusal, took the said 30 pints, &c. for and in the name of a distress for the said toll. The 2nd special plea introduced another exemption from the payment of the toll, viz. where the wheat was drawn into the city in the cart or carriage of any freemen, &c.; and stated that on payment of such toll on request, the corporation had immemorially taken the same out of the wheat so sold by sample in the said market, and afterwards brought to be delivered to the buyer in the said borough or city, and to detain the same for the said toll. The 3rd special plea stated that the city of Worcester was immemorially lying within and parcel of the manor of Worcester, of which manor the corporation, &c. have been immemorially seised, and in respect of such manor have immemorially taken and received the toll for and in consideration of the liberty of coming, going, and passing with corn and grain into the said borough or city,

so being parcel of the said manor; and in case of non-payment have immemorially taken a reasonable distress, &c. The 4th plea stated that the corporation have immemorially repaired the horse and carriage road in a certain street in the said city of Worcester, called the corn-market, amongst others; and by reason of the premises have immemorially taken and received the said reasonable toll, viz. one pint for every 3 bushels of corn or grain by any person brought into the said borough or city over and along the said horse and carriage road, in the said street called the corn-market, to be delivered to any buyer thereof; except as before, &c.; with the same power of distress and detention in case of non-payment: and then averred that the plaintiff *had brought into the said city 93 bushels of wheat over and along the said horse and carriage road to be delivered in the said city, &c. Wherefore, &c. The replication to the first special plea traversed the liability of the corporation to repair the highways and pavements of the corn-market, and other highways and streets in the borough or city, as stated in that plea, and that by reason thereof they have been entitled to take the toll therein claimed: and the like traverse was taken on the second plea in respect of the claim of toll there stated. The replication to the 3rd plea traversed the right of toll therein claimed in respect of the seisin of the manor of W. in consideration of the liberty of going with corn into the said borough or city, as claimed in that plea. And the replication to the 4th plea traversed the liability of the corporation to repair the horse and carriage road in the street called the Corn-market, among others, and their right in respect thereof to the toll claimed. On all these traverses issues were taken.

At the trial of the cause before Le Blanc, J. at Worcester, it appeared that the corporation had immemorially repaired the pavements of the corn-market and some of the streets in the city, but not all of them: and no question was made but that they were immemorially entitled to and had always received the toll claimed in respect to all corn brought in bulk into the corn-market and sold there. And they had also received toll of all corn sold in the market by sample, and afterwards brought into the city to be delivered since the practice of selling by sample

HILL
v.
SMITH.

[*479]

HILL
v.
SMITH.

[*480]

had prevailed. And the only question was, whether they had a prescriptive claim to the toll for corn sold by sample in the market, and afterwards delivered within the city; in which manner the corn, for the toll of which the distress *in question had been taken, had been sold and delivered; the sample having been exhibited in the market by the plaintiff, the seller, in a small bag, at the time of the sale, before any part of the commodity in bulk had been brought into the city, but which was afterwards delivered in the market-place within the city. Of the precise time when this mode of selling by sample in small bags originated no certain evidence was given, but probably about 40 years ago, as it appeared upon the whole of the evidence. The general evidence as to the mode of selling corn in this market went back to about 60 years ago, at which time some of the witnesses first recollected attending the weekly markets. The corn was then brought in bulk on horseback and in carriages, for the most part in bags, and was pitched in the market-place. Sometimes a single bag was so pitched, and the rest were left at hand in the waggon in which they had been brought there. But as far back as living memory went, if the corn so deposited in bulk, or part pitched and the rest left in the waggon on one market day, was not then sold, instead of being taken home again by the owner, it was commonly deposited in some warehouse or inn within the city till the next market day, when a single bag of it would be brought and pitched in the market-place to serve as a sample of the quality of the rest of it; and when sold in that manner toll was paid for the whole quantity sold, the same as if the whole had been then pitched in the market. One old witness spoke of sales by sample in the market (*i.e.* sales by sample in small bags without any previous pitching of the bulk in the market-place) having began according to his recollection about the years 1764 or 1766, and that soon after they became very general. It was objected, on the part of the plaintiff, that this evidence *(the substance of which only is here given) did not prove, but negatived, the prescriptive claim of the corporation for toll upon a sale by sample, such as had been made in the present case. But LE BLANC, J. told the jury that the exercise of the right of

[*481]

HILL
v.
SMITH.

taking toll for corn sold by sample for so many years back was evidence of the grant of such a toll to the corporation before time of memory : and that though the practice of selling corn by sample in small bags, without any previous pitching of the bulk of the commodity in the market-place, appeared to have grown up in modern times ; yet as it appeared that as far back as between 1740 and 1750, to which the evidence went, corn which had been pitched in the market-place on one market day, and not then sold, had paid toll upon the sale of it on a future day, when the bulk of it had been removed and lodged elsewhere in the city, and only a small part, as one bag, brought into the market, which was exhibited as a sample of the rest ; he thought this was evidence for the jury to decide upon, whether the prescriptive grant of toll to the corporation did not include sale by sample as laid in the defendant's first special plea ; and the jury accordingly found a verdict for the defendant on the first special issue.

In last Michaelmas Term *Williams*, Serjt. moved for a new trial, upon the alleged ground of the misdirection of the learned Judge, in having left it to the jury upon the facts in evidence to presume a prescriptive grant of toll to the corporation upon all corn sold by sample, as well as in bulk, when the practice of selling by sample at all, in the sense in which sales by sample are now understood, was proved to have originated within living memory. And the Court granted a rule to shew cause, in order to *have the question, which was of extensive consequence, more fully discussed. And in this Term

[*482]

[The rule having been argued:]

LORD ELLENBOROUGH, Ch. J. :

[486]

Without suggesting any opinion upon the questions which appear upon the record, I shall confine myself to the only question for our consideration upon the present rule, whether the evidence received at the trial were competent to be submitted to the jury in proof of the allegations contained in the first special plea. In that plea an immemorial right of toll is claimed by the corporation for corn sold in their market by sample, and

HILL
v.
SMITH.

[*487]

afterwards brought into the city to be delivered to the buyer. This claim is not made specifically as a claim of a market toll; because it is stated that they have immemorially repaired a certain place in the city called the corn market, and other highways and streets *in the city for the more convenient bringing of the grain to be sold there; and that by reason of the premises they have immemorially taken the toll claimed by them. This may apply to a claim of toll thorough, and is not confined to a mere market toll. The only question now is, whether upon this claim so stated the jury might fairly presume from the evidence laid before them that the corporation had a prescriptive grant of such a toll. Sales by sample must be as old as commerce itself; and in the case of bulky commodities like corn, the convenience of mankind must at all times have required an exhibition of them by sample in some manner or other; but sales by sample in a market, where the bulk of the commodity is never brought into the market at all, may be of modern introduction. If the grant were of toll on all sales in the market generally, that might be taken to include sales *quovis modo*, by sample or otherwise. But what is the evidence of sales by sample on which toll has been taken? It appears that from about 1764 the practice of selling by sample in the manner now used grew to be very general; but before that, and as long back as any witnesses could remember, there were occasional instances of sales by single bags in a subsequent market on which toll was taken, where the bulk of the commodity had been brought into the market on a prior day, and remaining there unsold had been removed into other parts of the city. Now though that would not prove the taking of toll on sales by sample of things afterwards brought into the city; yet still it would be evidence of sales by sample. The fact of such sales was notorious: but whether in every instance of that kind, the bulk of the commodity had actually before been pitched in the market on a prior market day might not be so certain, though

[*488]

the witnesses might believe *that it had: but for above forty years back, it is agreed that such sales had taken place without any exhibition of the commodity in bulk in the market, on which toll had been taken. Then taking the whole of this evidence

HILL
v.
SMITH.

together, can we say that it was not competent evidence to be left to the jury, (for that is the only question now,) to presume that the practice of taking toll on such sales had prevailed immemorially. And the jury having found in favour of the prescription as laid in the plea, I see no ground for disturbing the verdict. What the effect of such finding may be, as to the questions which arise upon the record, I give no opinion.

LE BLANC, J. :

I thought at the trial that the evidence was sufficient to go to the jury upon the prescription, and my opinion still remains the same.

BAYLEY, J. :

This was proper evidence to be left to the jury. The plaintiff had in truth all the benefit of the market and of the repair of the streets sustained by the corporation. The practice, as it now prevails, is admitted to have existed for above 40 years ; and therefore the question does not rest now on the same ground that it did in the year 1764 : for after an acquiescence for so many years by those persons who were interested in resisting the claim if it had been considered to be unfounded at the time, the jury might with more reason presume that there did exist a like usage before that time, though not known to the particular witnesses who were examined. Former instances of this sort might have been remembered and known to the jury, that after persons had brought part of their corn into the market and sold it there, they had contracted there to sell a larger quantity *of the same kind, and for which, upon its being afterwards driven through the streets and delivered in the city, toll may have been claimed. This would properly be a sale by sample, and if the claim of toll on the whole quantity had been submitted to, that would have warranted them in finding the fact of a prescriptive toll on sales by sample.

[*489]

Rule discharged.

[Subsequently the Court of K. B. gave judgment for the defendant. The plaintiff brought error in the Exchequer Chamber, and the Court having, after argument, taken time for considera-

1812.
June 5.
[4 Taunt.
520—533]

HILL
v.
SMITH.

tion, the judgment of the Court in error was on June 5, 1812, delivered by]

[531] MANSFIELD, Ch. J. :

This case has remained so long, not so much from any great difficulty that attends it, as from the singularity of the case. The venue is laid at Droitwich, not at Worcester. The defendant pleads a right under the corporation of the city of Worcester, to take the corn as a toll upon what is called, in the pleadings, a sale by sample. The sole question is, whether the prescription is such an one as can be sustained in law. If claimed as toll-thorough, it cannot be supported, for it is not alleged that the corn passed over any street which was repaired by the corporation. Therefore, there is no pretence for calling it toll-thorough. The plea must therefore rest upon the right to take toll of corn sold by sample. In stating that right, the defendant alleges that the corporation repaired the streets for the more convenient bringing the corn into the city to be sold there. It is contended that this claim cannot be supported. This is the first time such a toll was ever thought of. I was surprised that any evidence could be found to satisfy a jury that such a right existed. It is well known that sales by sample are of modern introduction, and it was so admitted by the defendant's counsel, as an excuse for not finding any case in support of such a right.

[*532] We understand at *this day what a sale by sample is, but there is no explanation of it in any law book. The sale by sample has no connection with the market; the corn so sold is never brought into the market; and if toll might be demanded for corn so sold, I cannot see why it might not be demanded for any sale whatever contracted for in a market; for the sample is only used to show the quality of the thing sold. When one considers the sale by sample, as it is called, it is an abuse of the word sale. It is no sale at all. It is a contract to sell a quantity of goods answering to the sample, but not any specific goods: it is to sell 50 bushels of corn of such a quality, but no specific 50 bushels. The corn is not sold in the market; and the toll to be paid for a sale in a market, is for corn brought into the market, and there sold. Lord COKE, in his comment on the statute of Westminster the 1st; 2 Inst. 220, and on the stat.

HILL
v.
SMITH.

31 Eliz., *ibid.* 713, says, that the common law did hold it for a point of great policy and behoveful for the commonwealth, that fairs and markets overt should be replenished, and well furnished with all manner of commodities vendible in fairs and markets, for the necessary sustentation and use of the people; that fairs were invented that contracts might have good testimony, and be made openly, and that the seller might know what to ask, and the buyer what to give; and he quotes many passages (and amongst others one from the *Mirror*, C. 1, s. 3,† which I could not find) which shows that the goods should be brought into the market, and that the goods should be sold there publicly. This sale by sample is directly contrary to the origin and purposes of markets, and it would be a strange thing, that toll should be taken by the owners of the market on that very transaction, which is contrary to the intention of the market. Lord COKE defines toll to be a compensation to the owner of the fair or market, upon the sale of things tollable within the fair or market. In *Mosely v. Pierson*‡ the Court said, that the very words “sold in a market” implied that the thing must be in the market. If so, what sort of grant from the Crown can we imagine to support this prescription? No particular case has been cited, in which there has been an exact decision that toll shall not be taken for goods not brought into a market: but in *Kerby v. Whichelow*, Lutw. 1502, POWEL, J., said that the King could not grant a toll of things not brought into the market, and Lord Chief Baron COMYN in title Market, adopts the doctrine of Powel. All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market, and Lord COKE so says in his 5 Rep. 82, and that every part, both of the treaty and completing of the sale, must be in market overt. It was properly argued by the counsel for the plaintiff, that all the doctrine of the Court of *pièpoudré* was contrary to the notion of a sale by sample. Such a sale could not possibly be the subject of that jurisdiction; for whatsoever

[*533]

† The reference appears to be to the paragraph on fairs and markets near the end of that section, *Mirror* of Justices, p. 14, Eng. ed. 1646. —F. P.
‡ 4 T. R. 107.

HILL
v.
SMITH.

is there determined, according to 4 Inst., must be concerning matters only done on the day of that market, in the place and hours of the market, neither before nor after; no contract made before, or to be executed afterwards, can be the subject of the jurisdiction of that Court; yet the law says, *pièpoudré* is incident to every market and every fair, and has consuance of all matters arising in the market, consequently it is impossible that a sale by sample can be considered as a sale in the market. We are therefore of opinion that the prescription cannot be supported, and that the plaintiff below is entitled to recover his damages, and the judgment of the Court below must be reversed.

Judgment reversed.†

1809.
Feb. 4.

[520]

DOE, ON THE DEMISE OF WM. ASKEW AND ANOTHER,
v. AGNES ASKEW.

(10 East, 520—522.)

Entries on the rolls of a manor court of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held during her chaste viduity, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced.

THIS ejectment was brought by devisees in remainder after the customary estate of the last tenant's widow, to recover a customary estate held of the manor of New Hatton in Westmoreland, in the possession of the defendant, who was the widow of Roger Askew, the customary tenant last seised, and who held the same, as was alleged, by the custom of the manor, during her chaste viduity; on the ground of her having forfeited her estate by incontinency during her widowhood. The fact of her having had a child long after her husband's death and before the demise laid being proved, the steward of the manor, of which Lord Lonsdale was the lord, gave evidence of the custom, that the widow of a customary tenant dying seised, on paying a heriot, holds during

† The reporter is indebted for the judgment in this case to the known accuracy of Mr. Peake.

her chaste viduity, and loses her estate if she marry or have a child. That if a man die leaving a widow, and devise his estate to another, the devisee is not admitted till her death or the sooner determination of her estate. And that when an heir or devisee is admitted on the determination of a widow's estate, it is usual in the admission to take notice of the widow's estate, and how she loses it, whether by marriage *or otherwise: as thus: the party prays to be admitted; such an one, widow, who held the same during her chaste viduity, according to the custom of the manor, being now married, or being now dead, &c. That he had known many instances of such admissions. The same witness however proved, that he had known no instances in fact where a widow had lost her estate by incontinency during her widowhood; and that the simple term viduity was used as often as chaste viduity in the admissions. Another witness who had been acquainted with the manor for 50 years (which was long before the time spoken to by the steward of his own knowledge) also deposed to the custom being for the widow to hold during her chaste viduity; though he knew no instance in fact of the forfeiture of a widow's estate for unchastity. But in 1758 (being an attorney) he was proceeding to get an affidavit of a widow having had a child, in order to get an admission; but she dying, it became unnecessary. On this evidence it was objected at the trial, by the defendant's counsel, that as there was no instance in fact proved of a widow's losing her estate by unchastity, that part of the custom as to chaste viduity was not proved. But Wood, B., before whom the cause was tried, being of opinion that the entries on the rolls of admissions noticing and recognizing the custom, and the parol evidence above stated, were sufficient to prove it; a verdict was taken for the plaintiff; and a recommendation was given by the learned Judge to the defendant's counsel to take the advice of this Court upon his direction.

Doe ex dem.
 ASKEW
 v.
 ASKEW.

[*521]

Topping accordingly obtained a rule in last Michaelmas Term, which he was now called upon to support, for setting aside the verdict and granting a new trial, on the *ground that the custom for the widow to forfeit her estate for unchastity was only proveable by evidence of instances in fact of such a forfeiture

[*522]

DOE ex dem.
ASKEW
v.
ASKEW.

having been enforced. He urged shortly the danger of establishing a cause of forfeiture by custom merely from the form of some of the entries of admissions of third persons made by the lord's steward, unsupported by any evidence of its having been acted upon, and contradicted by other entries on the rolls.

Cockell, Serjt. was stopped by the Court.

LORD ELLENBOROUGH, Ch. J. :

There was certainly evidence of the custom relied on to go to the jury, though no instance were known of a widow having in fact forfeited her estate for this cause. It might have happened that from fear of the forfeiture, or from the sense of moral obligation, no such instances of forfeiture had occurred. The custom would then come to be decided by evidence of the form of admissions only. Those that were made *durante castâ viduitate*, if uncontradicted, would be evidence that such was the condition on which the estates in the manor were originally granted out : and these are not necessarily contradicted by the entries of admissions *durante viduitate* generally ; for they might be understood of a viduity according to the custom, which the other entries would shew to be a chaste viduity. There is therefore no necessary contradiction between them ; and the jury have decided the question.

PER CURIAM :

Rule discharged.

1809.
Feb. 7.

LIDDARD v. LOPES AND ANOTHER.†

(10 East, 526—530.)

[526]

Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendants on a voyage from Shields to Lisbon, with convoy ; the freight to be paid on right delivery of the cargo ; the ship having sailed from Shields with her cargo and joined convoy at Portsmouth, and after being detained near a month off Lymington, her sailing orders being recalled by the convoy, in consequence of the occupation of Portugal by the enemy ; and the

† Cited by QUAIN, J., in *Metcalf* 1 Q. B. D. 613, 633.—R. C.
v. *Britannia Iron Works Co.* (1876)

defendants having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendants, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight *pro rata* or demurrage.

LIDDARD
v.
LOPES.

[*INDEBITATUS ASSUMPSIT* for the use and hire of a ship, &c. Verdict for the plaintiff, subject to the opinion of the Court upon the following case:]

The plaintiff was the owner of the ship *Mayflower*: the defendants were merchants in London: and on the 24th of August, 1807, an agreement in writing, in the nature of a charter-party, was entered into between them, whereby it was “mutually agreed between W. Liddard, owner of the ship the *Mayflower*, then lying at Hull, and Messrs. Lopes and Collins of London, merchants, that the said ship being tight, &c. should, with all convenient speed, proceed to Shields, and there load from the factors of the freighters a full and complete cargo of coals in bulk, and proceed therewith to Lisbon with the first convoy, and deliver the same on being paid freight, at the rate of 45*l.* per keel, together with 5*l.* per cent. primage, in lieu of port charges and pilotage, (the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage, always excepted;) the freight to be paid on right delivery of the cargo. Fifteen running days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the ship at *Lisbon, and the customary time to load at Shields; and ten days on demurrage over and above the said laying days at 5*l.* per day. Penalty for non-performance of this agreement, 500*l.*” Soon after this agreement was made the ship took in a cargo of ten keels of coals belonging to the defendants at Shields, and sailed thence on the 3rd of September, 1807, and arrived at Portsmouth on the 15th in order to join convoy. On the 20th, the captain having received sailing instructions, sailed with the convoy from Portsmouth, and came to an anchor off Lymington, where the convoy was detained by contrary winds until the 15th of October; and on the 17th the sailing instructions were recalled, and the next day the ship returned to Spithead. The ports of Portugal were in the beginning of November shut against British ships by

[*527]

LIDDARD
v.
LOPES.

[*528]

the Portuguese Government, and continued shut until the French took possession of Portugal on the 30th of November ; and from that time until and after the bringing of this action, Portugal has been occupied by the King's enemies, and the existing Government of the country has been at war with Great Britain. On the 26th of December the plaintiff gave the following notice to the defendants : " I beg leave to confirm my notice to you of the 19th Nov. ; and I hereby give you further notice to get out the *Mayflower's* cargo of coals at Portsmouth ; and unless necessary proceedings are taken to that effect on or before the 31st instant, I shall give orders to land and warehouse the same at your risk and expense. The average account shall be made out without further delay, and I shall wait on you for your proportion thereof. I also herewith inform you that I reserve to myself the right of proceeding against you at law for freight, demurrage," &c. On the first of January, 1808, the defendants sent the following answer to *the plaintiff : " If you land the coals by the *Mayflower* you will take the consequences. We do not consent, if we are to be called upon for freight and expenses." The cargo remained on board the vessel at Portsmouth until the 12th of February, 1808, when it was landed by order of the plaintiff, after a previous notice given to the defendants. In March last, by consent of both parties, but without prejudice on either side, the coals were sold, and produced, after deducting the invoice price and all expenses of unloading, landing, and warehousing, a neat profit of 166*l.* 18*s.* The question for the opinion of the Court was, Whether the plaintiff were entitled to recover a compensation for the part of the voyage which he had performed, and for the detention of his ship at Portsmouth ? If he were not entitled to recover for either of these demands, a verdict was to be entered for the defendants.

Taddy, for the plaintiff, proposed two points for argument ; first, whether the owner of the ship were entitled to freight *pro ratâ*, under the circumstances, for the part performance of the voyage from Shields to Portsmouth : and secondly, whether he were entitled to recover for demurrage during the stay of the ship at Portsmouth. 1st, On principles of natural justice the plaintiff is entitled to recover something ; for he has loaded a cargo, and

incurred expense and risk for the defendants. The objection, if any, can only arise upon the express contract in the charter-party excluding the implication of a promise founded upon natural justice: and that would be so, if the charter-party had provided for the case which has happened: but an unforeseen emergency has arisen, quite beside the case which was provided for by the charter-party, beyond the control, and without the default of *either party; which has prevented the execution of the contract by making it illegal to carry the goods to a port occupied by the enemy. This made an end of the contract, and did not merely suspend its execution like a temporary embargo in our own ports until the further order of council.† This then brings the case within the principle of *Luke v. Lyde*,‡ where an implied promise was raised on the ground of the labour performed for the benefit of the defendant in carrying his goods part of the voyage contracted for, in conformity with the rule of the marine law which allows of freight *pro ratâ*. And this was not over-ruled by *Cook v. Jennings*; § for that was an action of covenant upon the charter-party itself, and therefore the plaintiff was not entitled to recover any freight by the terms of the contract, without shewing complete performance of the voyage contracted for. And in *Mulloy v. Backer*|| the Court seemed inclined to support the principle of *Luke v. Lyde*.

LIDDARD
v.
LOPES.

[*529]

LORD ELLENBOROUGH, Ch. J. :

That was upon the ground of there having been an acceptance of the cargo by the owner in the course of the voyage, which shewed his election to receive his goods at that place, instead of having them sent on to the place of their original destination: but the acceptance of the goods was the very substance of the new implied contract in *Luke v. Lyde*. But here there has been no agreement to accept the goods; but they were landed and sold without prejudice to either party. The case of *Luke v. Lyde* has been often pressed beyond its fair bearing; but the true sense of it has been explained by my brother LAWRENCE in *Cook v. *Jennings*, and my brother LE BLANC in *Mulloy v. Backer*. Then

[*530]

† *Hadley v. Clarke*, 4 R. R. 641
(8 T. R. 259).

‡ 2 Burr. 882.

§ 4 R. R. 468 (7 T. R. 381).
|| 7 R. R. 704 (5 East, 316).

LIDDARD
v.
LOPES.

what does this case amount to. The parties have entered into a special contract, by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract; and that event has not taken place; there has been no such delivery; and consequently the plaintiff is not entitled to recover: he should have provided in his contract for the emergency which has arisen.

Per CURIAM :

Postea to the defendants.

Storks for the defendants.

1809.
Feb. 9.

ATKINSON v. RITCHIE.

(10 East, 530—536.)

[530]

The master and the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to St. Petersburg, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same, on being paid freight, &c.; held that the master, after taking in at St. Petersburg about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian Government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted *bond fide*, and under a reasonable and well-grounded apprehension at the time; and a hostile embargo and seizure was in fact laid on six weeks afterwards.

THE plaintiff declared specially in assumpsit against the defendant for breach of an agreement, in not loading a complete cargo of hemp, under the same circumstances before set forth in the case of *Ritchie v. Atkinson*;† with counts for money paid, and on an account stated: to which the defendant pleaded the general issue. And at the trial before Lord Ellenborough, Ch. J. at Guildhall, *a verdict was taken for the plaintiff for 2,000*l*.

[*531]

† *Ante*, p. 307 (10 East, 295). As the plaintiff in that case was the defendant here, and *vice versa*, in reading the facts there stated, the descriptions of plaintiff and defendant, as there applied, must here be reversed. And the present case concluded with stating (as before, *ante*,

p. 309 (10 East, 298)), that "the *Adelphi* arrived in London and delivered her cargo there to the plaintiff" (the then defendant). The remaining facts stated in the former case not being material to raise the question now made.

damages, subject to an award as to their amount, and to the opinion of the Court upon a special case, stating all the circumstances set forth in the former report.

ATKINSON
v.
RITCHIE.

This case was argued in the last Term by *Taddy* for the plaintiff, and by *Littledale* for the defendant. * * *

LORD ELLENBOROUGH, Ch. J. now delivered the opinion of the Court :

[533]

The question between the parties in this case arises upon an agreement in the nature of a charter-party. The parties are the merchant freighter on the one hand, and the master on the other : each contracting for himself with the other, as principals. Under such circumstances any constructive agency on the part of the defendant, in his character of master, for the plaintiff, as the freighter of goods, is wholly out of the question. Their relative claims upon, and duties in respect of, each other are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine v. Jane*, Alleyn, 27, has been often recognized in courts of law, as a sound one ; *i.e.* that “ when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if *he may ; notwithstanding any accident by inevitable necessity ; because he might have provided against it by his contract.” And this has been recognized in several cases, as in *Bullock v. Dommitt*, 6 T. R. 650,† and *The Company of Proprietors of the Brecknock and Abergavenny Canal Navigation v. Pritchard* and others, 6 T. R. 750.‡ It has been contended that the exception contained in this contract, of “ restraint of princes and rulers during the voyage,” excuses the not taking on board a complete cargo in this case. But, without considering whether this provision respecting restraint of princes, &c. be at all applicable by way of excuse for the non-performance of this part of the master’s stipulated duty, viz. the taking on board a complete cargo ; yet, at any rate, the restraint meant must be an actual and operative restraint, and not a merely expected and contingent

[*534]

† 3 R. R. 300.

‡ 3 R. R. 335.

ATKINSON
v.
RITCHIE.

one, as this at most only was. But, it has been further argued by the defendant's counsel, that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter; yet, that he is so, at any rate, on the ground of his paramount duty to the State; which required him to save the property and crew under his charge from the impending peril of an instantly expected embargo: and, that, in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the State is materially involved. That no contract can properly be carried unto effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law; are propositions which admit of no doubt. Neither can it be questioned,† that, if from a change *in the political relations and circumstances [of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his sovereign and the State of which he is a member; the non-performance of a contract in a State so circumstanced is not only excuseable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place; and that the danger to result to the public interests of his own country, from an observance of the contract, should be clear immediate and certain. In short, such a state of circumstances must be shewn to exist, as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty. Can any thing of this kind be said, with truth, to exist in the present case? No actual change in the political relations of Great Britain and Russia had then taken place. The danger to

[*535]

† The passage which here follows is cited at length by Sir R. PHILLIMORE in his judgment in *The Teu-*

tonia (1871) L. R. 3 A. & E. 394, 412, 24 L. T. 521.—R. C.

ATKINSON
v.
RITCHIE.

result from remaining at Cronstadt was neither immediate or certain : in point of fact it attached only at the distance of many weeks afterwards. And no one can venture to suggest even in argument, that the loading in question might not have been completed without any criminal compromise of public duty. Indeed to allow a man to withdraw himself from the performance of a distinct positive contract upon the ground of some speculative inconvenience suggested as likely to result from such performance to the general interests of the State, would afford great encouragement to disingenuous subtleties and refinements upon subjects of *this kind, and would render all reliance upon the solemn stipulations of parties in commercial matters precarious and insecure; and which encouragement this Court would most reluctantly lend its assistance to administer. For the reasons already given, such an argument has no foundation to rest upon in the present case. Therefore, neither upon this ground, any more than upon the others already considered, is the plaintiff precluded from a right to recover. The consequence is, that the verdict for the plaintiff must stand, and the postea be delivered to the plaintiff.

[*536]

DOE, ON THE DEMISE OF HARDWICKE, v.
HARDWICKE.†

(10 East, 549—554.)

1809.
Feb. 9.

[549]

Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock, including, as to six of the estates, three several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make three in like manner, as after mentioned, for other persons to do the same;" and then giving this general power, "that when and so often as the lives on either of the estates before given shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or estates to renew the same with the person or persons to whom the revenue thereof shall belong by adding a third life in such estate, and paying such reversioner two years' purchase for such renewal; and also to exchange either

† Cited and applied in the judgment of Lord SELBORNE in *Swinburne v. Milburn* (H. L. 1884) 9 App. Cas.

844, 850, 54 L. J. Q. B. 6, 52 L. T. 222.—R. O.

DOE dem.
HARDWICKE
v.
HARDWICKE.

of the said two lives on payment of one year's purchase:" Held that this power of renewal only authorised the addition of one life to the three on each estate, and of making one exchange of a life.

THIS case was argued in Michaelmas Term last by *Abbott* for the plaintiff, and *Jervis* for the defendant. The argument turned wholly on the intention of the testator to be collected from the particular provisions of a very perplexed will. And after consideration,

LORD ELLENBOROUGH, Ch. J. now delivered the judgment of the Court :

[*530] This was an ejectment for premises at Tytherington in the county of Gloucester ; and both parties claimed under the will of Dr. Peter Hardwicke ; the lessor of the plaintiff under a residuary clause in the will ; and the defendant under a lease, which he insists was warranted by a power which the will contains ; and the case depends upon the validity of that lease. Dr. Hardwicke by his will devised part of his estates (not now in question) to trustees, in *trust to sell and pay debts and legacies ; and subject thereto, he devised part of it to his nephew James Hardwicke for life ; with remainder to his first and other sons in strict settlement ; with several remainders over. The testator then devises seven different estates, the last of which is the estate in question. The first he devised to his nephew Samuel for life ; remainder to Samuel's wife for life ; remainder to all and every his children for their respective lives. The next he devised to his nephew James for life ; remainder to James's sister Elizabeth for life : and power is given to them " to add or declare another life or lives to make three, in like manner as after mentioned for other persons to do the same." The third estate he gives to trustees during the lives of his brother Joseph and his four children, in trust to pay a moiety of the rents to Joseph for life, and the other to his children, and upon Joseph's death to pay the whole to the children. The fourth estate he gives to his nephew George for life ; remainder to George's wife for life ; remainder to all and every the children of George for their lives. The fifth estate he gives to his niece Rachel (wife of Daniel Ludlow) for life ; remainder to her son for life. The sixth estate he gives to his brother Benjamin for life ; remainder

to Benjamin's wife for life; remainder to all and every his children for their respective lives. And the seventh estate he gives to his sister Rachel Shellard for life; remainder to her husband for life; remainder to their children Edward, Thomas, and Mary, for their respective lives. He then gave power to Mrs. Shellard, his brother Benjamin, and his nephews Samuel and George, to direct which of their children should have priority of enjoyment. After which follows the power upon which the case arises, which is in these words. "And my will *further is, that when and as often as the lives on any or either of my estates before given to my said sister, brothers, and nephews, shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or estates to renew the same with the person or persons to whom the revenue thereof shall belong and appertain, by adding a third life in such estate, and paying such reversioner after the rate of two years' purchase for such renewal; and also to exchange either of the said two lives, on payment of one year's purchase for such exchange." The testator then limits the residue of his estate to his nephew James and his first and other sons in strict settlement; remainder to his nephew Samuel and his first and other sons in strict settlement; remainder to his brother Joseph for life; remainder to Joseph's first and second sons, John and Peter, successively, and their first and other sons in strict settlement; remainder to Joseph's other sons in tail male; with divers remainders over. And he assigns as a reason for preferring his nephew James to his nephew Samuel, that James's father had had great trouble in purchasing for him part of the estate devised. By a codicil the testator provides, "that no wife of any of his brothers or nephews should have power to add or exchange any second husband as a third life." These seem to be the material parts of the will and codicil.

On the 1st of December, 1766, the lives upon the 7th estate (that given to the Shellards) were reduced to two; and George Hardwicke being the person then enjoying that estate, he procured the addition of a third life. The additional life soon afterwards died; and on the 21st of December, 1770, George Hardwicke, being still the person enjoying the estate, procured the

DOE dem.
HARDWICKE
v.
HARDWICKE.

[*551]

Doe dem.
HARDWICKE
v.
HARDWICKE.

[*552]

addition of another life. Each of these lives were put in by Joseph Hardwicke who *was become entitled to the reversion for life. Joseph Hardwicke is since dead, and the lives are reduced to the last additional one he put in; so that unless the lease by which he put in that life is warranted by the power, the lessor of the plaintiff is entitled to recover. For the plaintiff it is contended, that the power warrants only one renewal, and one exchange of a life, in respect of each estate: for the defendant, that it warrants repeated renewals, and repeated exchanges of a life, from time to time, whenever the number of lives on each estate is reduced to two. It is observable that the estates for life given by this will are not estates *pur autre vie*, but estates for life given to several persons successively; and the exchange of a life, or the addition of a life, to be made when the lives on the estate so given shall be reduced to two, must be in the same manner; that is, the life of a person to enjoy the estate for his or her respective life, not of a life to be put in, during the continuance of which any other person to whom a life estate is limited, or his or her assigns, shall enjoy the estate; so that there seems no reason why the testator should give a perpetual right of such nomination to persons who must be strangers to him. The right of once naming a new life, and of exchanging an old life for a new one, might be with a view of enabling a brother or nephew to provide for a second wife, or to provide for a wife which any of the sons of his brother, sister, or nephew, might happen to marry: and the clause in the testator's codicil seems to favour such a construction; by which he declares, that no wife of any of his brothers or nephews should have power to add or exchange any second husband as a third life. This shews

[*553]

the testator's anxiety to exclude any stranger from the *enjoyment of his estate; and also shews his intention that the life to be added should be that of a person by whom the estate was to be enjoyed by him or her, personally, during life: for if his intention had been to enable the person enjoying his estate to renew, by taking a lease to himself and his assigns during the life of a nominee; there could be no good reason why that nominee, or *cestui que vie*, should not be a second husband of a brother's or nephew's wife. Another argument for confining the

DOE dem.
HARDWICKE
v.
HARDWICKE.

power of renewal to one time only arises from the language used by the testator in the clause giving that power to his nephew James, and James's sister Elizabeth, in respect of the estate given to them. The testator has devised an estate to his nephew James for life; remainder to James's sister Elizabeth for life; with a power to them to add or declare another life or lives to make three, in like manner as after mentioned for other persons to do the same. These latter words assimilate the power given in this instance to the power given in the devises of the other estates; with this only difference, that inasmuch as in the devises of the other estates, the limitation being to more persons than two for successive life estates, the power of renewal is given only when those life estates shall be reduced to two: but this estate being given originally to two only, to take successive life estates, the power of nominating a third life is given to them immediately; but it is only given personally to them, and can only by the very terms of the power be exercised once: and no reason can be assigned why the power, professedly given to be exercised in like manner, should be exercised in a different manner. The argument in favour of a perpetual right of renewal, which pressed most strongly, was *drawn from the words, when and as often; which it was said could not be satisfied but by a perpetual right of renewal, whenever the number of lives on each estate so given should be reduced to two. It appears however to us that those words do not require such extensive construction; and that the words, as often, more properly relate to the several occasions of the lives on the several estates being reduced to two; inasmuch as there being more estates than one where the lives will be reduced to two, that event will happen more than once; respect being had to the several different estates. The defendant therefore claiming to hold in virtue of a second added life; all the original lives and one added life being spent; we are of opinion that the addition of such second life was not warranted by the power, and that the plaintiff is entitled to recover.

[*554]

Postea to the plaintiff.

1809.
Feb. 9.

HAVELOCK v. GEDDES AND OTHERS.

(10 East, 555—568.)

[555]

1. A covenant in a charter-party of affreightment that the owner shall at his expense forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages.†

But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action.‡

2. A ship having been let to freight for twelve months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of two, six, ten, and fourteen months, &c. it is no answer to a breach for non-payment of six months' freight due at the end of the ten months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the twelve months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months; and that he had paid the freight for all the time she was serviceable; and that she was not in his service for ten months in the whole: for *non constat* but that after she had been used by the freighter, she wanted repair without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair.

3. The freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from four months to four months, and the ship were lost before the end of fourteen months.

4. An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid till the ship's discharge, or return from her voyage, and the ship having sailed on a voyage to St. Domingo, where she arrived, but was burnt before her return; held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter; on which such extra allowance became payable.

THIS was covenant upon a charter-party of affreightment, dated the 5th of September, 1806, whereby the plaintiff, owner

† Followed in *Inman S. S. Co. v. Bischoff* (H. L. 1882) 7 App. Cas. 670, 673, 683, 52 L. J. Q. B. 109, 47 L. T. 581.—R. C.

‡ This confirmed by *Stanton v. Richardson* (1872, 1874) L. R. 7 C. P. 421, 432; 9 C. P. 390 (affirmed in

H. L., 45 L. J. C. P. 78, 33 L. T. 193). Also applied (by judgment of the majority) in *Jackson v. Union Marine Insurance Co.* (1873) L. R. 8 C. P. 572, 579, 42 L. J. C. P. 284; and in *Tully v. Howling* (1877) 2 Q. B. D. 182, 46 L. J. Q. B. 388, 36 L. T. 163.—R. C.

of the ship *Lord Duncan*, of 933 tons burthen, of which A. Heartley was master, let her to freight to the defendants for 12 calendar months certain from the 24th of September, 1806, and from thence for such longer period, if any, as the defendants should think fit to keep and retain the same, upon the conditions and covenants thereafter contained. And the plaintiff covenanted that the ship should be navigated and furnished with 50 persons, and such further number, not exceeding 100, as should be required by the defendants; the owner being reimbursed by the freighters for such additional number according to the average rate of wages and provisions expended on the whole. That the ship, during the time she should be navigated and employed under the charter-party, should be under the entire control of the *defendants, so far as related to all orders for sailing, destination, and delay. And the defendants covenanted to pay to the owner, for the hire and service of the ship for the said term of 12 calendar months, and such longer period as they should keep the same, the freight and rate following, viz. 24s. per calendar month per ton, being 1,119l. 12s. per month, commencing from the 24th of September, 1806, and ending when the ship should be returned to the river Thames, and there by the freighters declared to be discharged: it being understood that the freighters should not be at liberty to discharge the ship abroad, although she might be abroad at the expiration of the said 12 calendar months, or at any other place, but within the port of London. And that the freight should be paid in the proportions and at the periods following, viz. 2 months freight at the execution of the charter-party either in cash or by accepted bills of the freighters at 3 months from the said 24th of September; 2 months more at the end of 6 calendar months from the said 24th of September; 2 months more at the end of 10 calendar months; 2 months more at the end of 14 calendar months, should the ship be so long employed; and in like manner 2 months more at the end of every succeeding 2 calendar months, until the ship should be discharged; and immediately upon such discharge, the balance to be paid by the freighters in cash or their acceptances at 3 months. That the freighters should pay all port charges, tonnage duties, dock dues, and all

HAVELOCK
v.
GREGG.

[*556]

HAVELOCK
v.
GEDDES.

[*557]

other duties and dues, except lights and pilotage, which were to be paid by the owner. That they would reimburse to the owner the charges for additional men beyond 50 as before mentioned; two calendar months allowance for such additional men to be added to the first payment of freight; but the residue of such allowance *not to be paid until the ship's discharge, or return from her first intended voyage; and in like manner for any other foreign voyage or voyages. By virtue of which charter-party the defendants on the said 24th of September took the ship into their service and kept and retained the same therein until she was afterwards, and whilst she was so in their service, and after the expiration of 10, but before the expiration of 12 months from the same 24th of September, viz. on the 22nd of August, 1807, at St. Domingo, without any default of the owner, master, or mariners, consumed by fire and wholly lost, and was thereby prevented from returning to London. And then the plaintiff, after averring that the ship, during all the time she was so kept and detained in the service of the defendants, was navigated and furnished with 50 persons, and such further number, not exceeding 100, as was required by the defendants; and was during all that time under the entire control of the defendants as to all orders for sailing, destination, and delay; assigned three breaches; 1. That though the defendants paid the plaintiff the two months freight payable at the execution of the charter-party, and also the 2 months freight at the end of the first 6 calendar months; yet they did not pay the two months freight at the end of the said 10 calendar months. 2. That the defendants have not paid to the plaintiff any subsequent freight. 3. That although on the 24th of October, 1806, the defendants required the plaintiff to put on board, and he did put on board, 20 additional men beyond the 50, who all sailed in the ship on a foreign voyage to St. Domingo, and continued on board from thence until the loss of the ship; and although according to the average rate of wages and provisions expended on the whole, the defendants became

[*558] liable to pay to the plaintiff 8*l.* per *month for every such additional man; yet the defendants had not reimbursed the plaintiff for any of them.

The defendants craved oyer of the charter-party, by which it

HAVELOCK
v.
GEDDES.

appeared further that the plaintiff covenanted that the ship, at his expense, should be forthwith made tight and strong, and well and sufficiently equipped, manned, and fitted, &c. for a voyage or voyages of 12 calendar months to foreign parts; and should during the continuance of the charter-party be kept tight and strong, and well and sufficiently equipped, &c. and victualled; concluding with a mutual general covenant for performance: and particularly the plaintiff binding to the defendants the said ship, freight, tackle, &c. (the perils and dangers of the seas, rivers, &c. all inevitable accidents whatever, and capture by enemies, and the detention and restraint of rulers, &c. being excepted:) and the defendants binding to the plaintiff the goods put on board the ship. The defendants then pleaded, 1, *Non est factum*. 2ndly, That the ship was not at the expense of the plaintiff forthwith or within a reasonable time after the charter-party made tight and strong, and well and sufficiently equipped, &c. for a voyage or voyages of 12 calendar months to foreign parts; whereby she was delayed and hindered from proceeding on a voyage from London to St. Domingo, and was detained on her said voyage at Portsmouth for an unreasonable length of time viz. for 4 months, during all which time the defendants lost the use and benefit of the ship, and were put to great expense in repairing her and making her tight and strong and fitting her for such voyage; and also that thereby certain goods of the defendants on board the ship were wetted and damaged; wherefore they pray judgment of the plaintiff's action. 3rdly, The defendants pleaded as to the first breach, that during the *12 calendar months therein mentioned, viz. on the 1st of November, 1806, certain goods of the defendants were shipped on board the vessel to be carried from London to St. Domingo; and that at the time of shipping them the vessel was not tight and strong, and well and sufficiently equipped, &c. but was decayed, leaky, defectively provided, and in an unseaworthy state for performing the said voyage; in consequence whereof it became necessary to unload and repair her, and she was afterwards unloaded and repaired before she could proceed on and perform her said voyage: and by means of the premises the ship was unemployed by and wholly unserviceable to the defendants for a great part of the six

[*559]

HAVELOCK
v.
GEDDES.

[*560]

calendar months from the 24th of September, 1806, viz. for 4 calendar months part thereof. And then the defendants averred that they paid to the plaintiff for the hire and service of the ship for the residue of the said 6 calendar months the freight in the charter-party mentioned. The fourth plea was the same in substance as the last; omitting only to state that the defendants paid for all the time the ship was not wholly unserviceable to them or unemployed: and it avers that the ship was not in the actual service and employ of the defendants, or retained in such service under the charter-party, for 10 calendar months in the whole from the 24th of September, 1806, until she was consumed by fire as in the declaration mentioned, and which fire happened without any default in the defendants. 7thly, The defendants pleaded (to the second breach) that the ship after the charter-party made was not employed by them or in their service until the end of 14 calendar months from the said 24th of September, 1806; but while she continued in their service and employ, and before the end of 14 calendar months, &c. viz. on the 22nd of August, 1807, in parts *beyond the seas near St. Domingo, the ship, without any default of the defendants was consumed by fire and wholly lost. 8thly, (as to the last breach), That the defendants did reimburse to the plaintiff two calendar months allowance for the additional men beyond 50 put on board, &c.; and further, that after making the charter-party the ship sailed on a voyage from London towards St. Domingo, being her first intended voyage outwards under the charter-party with a cargo of goods of the defendants' on board; and that afterwards, on the 22nd of August, 1807, in parts beyond the seas near St. Domingo, the ship was, without default of the defendants, burnt and wholly lost, and never did return from St. Domingo aforesaid.

The plaintiff in his replication demurred to the 2nd, 3rd, and 4th pleas, and assigned for special causes of demurrer, that the defendants in each of those pleas had attempted to put in issue immaterial facts, and had insisted on divers covenants of the plaintiff as conditions precedent to the performance of their own covenant; whereas they were separate and independent covenants; and the breaches of covenants alleged against the plaintiff in these pleas were no answer to or justification of the breaches

of covenant of which the plaintiff complains. To the 7th plea the plaintiff replied, that the defendants after making the charter-party, viz. on the 18th of November, 1806, dispatched the ship with a cargo on a voyage to the island of St. Domingo; and that the ship afterwards, and after the expiration of 7 calendar months from the said 24th of September, 1806, and before she was so burnt and wholly lost, viz. on the 4th of May, 1807 arrived at St. Domingo, and delivered her cargo, and completed the said voyage. As to so much of the 8th plea as relates to the two calendar months allowance for the additional men, the plaintiff *took issue on the reimbursement of such allowance. And as to the residue of the plea he replied, that before the ship was consumed by fire, to wit, on the 20th of August, 1807, the ship had arrived at St. Domingo and completed the said intended voyage.

HAVELOCK
v.
GEDDES.

[*561]

The defendants joined in demurrer on the 2nd, 3rd, and 4th pleas; and demurred generally to the replications to the 7th and the latter part of the 8th pleas: on which there was also joinder in demurrer.

This case was argued on a former day in the Term by *Gaselee* for the plaintiff, and *Marryat* for the defendants. The questions made upon the demurrer to the 2d, 3d, and 4th pleas were, whether the agreement in the charter-party that the ship should be made tight and strong, &c. were a condition precedent to the payment of any freight; and whether the matters alleged in those pleas were an answer to the action on the breach of covenant for non-payment of the freight; or were the ground of a cross action against the plaintiff for damages. The next question arose upon the demurrer to the replication to the 7th plea, whether the ship not having returned from her voyage to St. Domingo back to the river Thames, and been there discharged, but having been burnt abroad before the end of 14 calendar months from the date of the charter-party, after she had completed her outward voyage to St. Domingo (which was completed after the end of 7 calendar months;) the owner were entitled to any part of the freight accruing after the expiration of six calendar months; which is what he claimed upon the second breach of covenant. The last question arose upon the demurrer

HAVELOCK
 v.
 GEDDES.
 [*562]

to the replication to the latter part of the 8th plea; whether the ship having been so burnt at St. *Domingo, and not discharged in the river Thames or returned from her first intended voyage; the plaintiff were entitled to any part of the extra allowance claimed by the last breach of covenant beyond the part payment made in the first instance. The substance of the arguments on these points were afterwards fully stated by the Court in giving judgment. And after time taken to consider,

LORD ELLENBOROUGH, Ch. J. now delivered judgment (after stating the declaration as before set forth) :

The defendant cravedoyer of the charter-party, by which it appeared that the plaintiff covenanted that the ship, at his expense, should forthwith be made tight, staunch, and strong, and well and sufficiently equipped, manned, &c. for a voyage or voyages of 12 calendar months, and should, during the continuance of the charter-party, be kept tight, staunch, &c. and well and sufficiently equipped, manned, &c.: and it is upon this covenant that the defendants have grounded several of their pleas. The first plea, upon which any question arises, states that the ship was not forthwith after making the charter-party made tight, staunch, &c. and well and sufficiently equipped for a voyage or voyages of 12 calendar months; *per quod* she was hindered from proceeding on a certain voyage from London to St. Domingo, and detained an unreasonable length of time; during all which time the defendants were deprived of the use of the ship, and were put to great expense in making her tight, staunch, &c. and fitting her for her voyage, and divers goods of the defendants which were put on board her were wetted and damaged. To this plea, which is pleaded to the whole of the demand, the plaintiff has demurred,*and the question upon it is, Whether the defendants are entitled to insist that the forthwith making the ship tight, staunch, &c. was a condition precedent. The defendants did not repudiate the ship, because she was not immediately made tight, staunch, &c. but took her into their service and employed her; and after having navigated her for several months, they say that, because this was a condition precedent, and was not performed, they are not liable to pay any thing.

[*563]

HAVELOCK
v.
GEDDES.

They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade: and to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c. would be a breach of the condition, and a defence to the whole of the plaintiff's demand. We are clear, however, that the defendants, who took the ship into their service and employed her in an unimpaired state, have no right to insist that the forthwith making her tight, &c. was a condition precedent. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained, as is laid down in *Porter v. Shephard*, 6 T. R. 668,† and in *Glazebrook v. Woodrow*, 8 T. R. 370, 371.‡ And it would be an outrage to common sense to say, that it could have been the intention of these parties, that if the defendants took to this ship, as a ship in their employ under the charter-party, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith, without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive upon the point. *Constable v. Cloberie*, *Palm. 397, shews that a covenant to sail with the first wind is not a condition precedent. *Bornmann v. Tooke*, 1 Campb. 377,§ proceeds upon the same principle. *Boone v. Eyre*, 1 H. Blac. 273,|| in the notes, lays down a very sensible general rule, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other: but where they go only to a part, and a breach may be paid for in damages; there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. Had the plaintiff's neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; because the consideration for the defendants' covenant to pay the freight would then have failed *in toto*; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part

[*564]

† 3 R. B. 305. ‡ 4 R. B. 700. § P. 707, *post*. || 2 R. B. 768.

HAVELOCK
v.
GEDDES.

only; the consideration has not wholly failed; and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, under a counter action, to such damages as they can prove they have sustained from this neglect. For these reasons we are of opinion that this plea cannot be supported, and that the demurrer to it must be allowed.

[*565]

The next plea submitted to the consideration of the Court is pleaded to the first breach only. It states that during the 12 months mentioned in the charter-party divers goods were shipped on board the vessel, to be carried from London to St. Domingo; that at the time of shipping them the vessel was not tight, staunch, &c. and sufficiently equipped, &c. but on the contrary was decayed, leaky, ill fitted, and in an unseaworthy state; that in consequence *thereof it became necessary to unload and repair the ship; that by means of the premises the ship became unemployed by and unserviceable to the defendants for a great part of six calendar months; and that the defendants have paid for the hire and service of the ship for the residue of the said six calendar months. There is another plea similar to this, except that it does not state that the defendants paid for all the time the ship was not unserviceable to them, or unemployed: and it avers that the ship was not in their service or employ for 10 calendar months in the whole. To these pleas the plaintiff has also demurred, and the question upon them is, whether the defendants have shewn such a neglect in the plaintiff, as will excuse them from the payment of the freight which the first breach claims. These pleas are founded, not upon the stipulation forthwith to make the vessel tight, staunch, &c. but upon the stipulation to keep it so; and it is not alleged that there was any defect at the commencement of the 12 months for which the vessel was hired; but that at the time of shipping the goods during the 12 months she was not tight, &c. It is therefore perfectly consistent with the allegations in these pleas, that the ship had been put into a perfect state, and thoroughly equipped, immediately after the execution of the charter-party; that she was so when the defendants took her into their service; but that she became otherwise, (which might be from one of the accidents to which all vessels are subject,) whilst in the defendants' employ. It is indeed

consistent with these pleas, that the vessel might have performed a voyage for the defendants before this defect occurred: and as it is a general rule that pleas are to be taken most strongly against the party pleading them; inasmuch as it is probable he would state his case as favourably *for himself as the facts would permit; we should be warranted in assuming this to be the case. The pleas do not state that there was any delay in making the repairs, or that it was through any default in the plaintiff that the defect had occurred. The question then is, whether, because the plaintiff has undertaken to keep the vessel tight, &c. the defendants have a right to deduct any thing out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of opinion they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charter-party is, that whilst those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments. As these pleas therefore do not shew that it was owing to any default in the plaintiff, that the defect in the ship occurred, or that there was any delay in repairing it; we are of opinion that no deduction is to be made from the freight on that account; that these pleas therefore are bad, and that the demurrer to them must be allowed.

The next plea, upon which a question arises, is pleaded to the second breach, (which claims freight beyond the expiration of six calendar months,) and this plea is, that the vessel was not in the service or employ of the defendants until the end of 14 calendar months, but within that *time was, without any default in the defendants, consumed by fire. To this the plaintiff has replied, that the vessel sailed for St. Domingo, delivered a cargo there after the end of seven calendar months, and was not burnt till afterwards. To this replication there is a demurrer; and the

HAVELOCK
v.
GEDDES.

[*566]

[*567]

HAVELOCK
v.
GEDDES. defendants contend that the stipulations in the charter-party, which fix the times for paying the freight, make the right to the portions of freight payable at those times depend upon the then safety of the ship ; and that the loss of the vessel before any one of those periods destroys the right, except for such freight as was previously payable. That a loss, for instance, after the end of six months, but before the end of 10, would have precluded the plaintiff from claiming more in the whole than four months freight : and that a loss after 10 months, and within 14, would have confined the plaintiff to six months freight. It is to be remembered however, that the charter-party stipulates that the defendants should pay a given freight per calendar month ; and the times fixed for its actual payment can only be considered as postponing, for the defendants' convenience, the actual payment of a sum then due to a future period ; not as creating a contingency whether it should ever be paid at all. Each month's freight therefore was earned, and became completely due, at the end of each month ; and it was nothing but the actual payment that was postponed. We are therefore of opinion that this plea is also bad, and that the demurrer to the plaintiff's replication must be over-ruled.

[*568] The last question arises upon the last breach, which is for the allowance of the extra men : of that allowance two months was to be added to the first payment for freight, and the residue was not to be paid till the ship's *discharge or return from her first intended voyage, and in like manner for any other foreign voyage or voyages. The defendants' plea to this breach is, as to the first two months allowance, payment ; and as to the residue, that the ship sailed upon a voyage to St. Domingo, and was burnt and lost before her return. The plaintiff has taken issue upon the payment ; and as to the residue has replied, that the ship arrived at St. Domingo, and completed that voyage. To this there is a demurrer ; and the defendants insist that as the ship never was discharged, and never returned, nothing beyond the first two months allowance became payable. But we are of opinion that the destruction and loss of the vessel was, within the true intent and meaning of this charter-party, a discharge of the vessel from the further prosecution of the adventure and em-

ployment in which she was engaged : and that upon that event, the residue of extra allowance became payable, as if the discharge had taken place by the act of the defendants themselves : and that the defendants must be understood to have discharged the vessel when they could by no possibility any longer employ her. We are therefore of opinion in favour of the plaintiff upon each of the several points raised by these pleadings.

HAVELOCK
v.
GEDDES.

Judgment for the plaintiff.

WINTER v. MILES, KNT. AND ANOTHER, LATE SHERIFF
OF MIDDLESEX.†

(10 East, 578—582; S. C. 1 Camp. 475 n.)

1809.
Feb. 13.

[578]

Kensington Palace being kept in a constant state of preparation to receive the King, with his officers, servants, and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of certain apartments therein.

THIS was an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias* issued at the plaintiff's suit against the goods of his Royal Highness the Duke of Sussex, residing at the time in Kensington Palace : and the only question was, whether Kensington Palace were under the circumstances entitled to the privilege and protection of a royal palace, so as to justify the sheriff in refusing to execute civil process there. The particular circumstances given in evidence were afterwards stated by Lord ELLENBOROUGH, Ch. J. in giving the judgment of the Court ; and the whole case was left by him to the jury at the trial to say, whether Kensington were *bonâ fide* a royal palace ; and they found in the affirmative. Upon which the Court was moved in last Trinity Term to set aside the verdict, and grant a new trial, on the ground of its being a verdict against law and evidence. And a rule *nisi* having been granted for the more solemn consideration of the matter ; cause was shewn in last Michaelmas Term by the *Attorney-General*, *Garrow*, and *Comyn* ;

† *A.-G. v. Donaldson* (1842), 10 M. & W. 117, (as to a distress for sewers' rates). Compare the case of Hampton Court Palace, where the Lords by a

majority, held that it was not privileged as a royal residence. *A.-G. v. Dakin* (H. L. 1870) L. R. 4 H. L. 338, 39 L. J. Ex. 113, 23 L. T. 1.—R. C.

WINTER
v.
MILES

[*579]

and the rule was supported by *Williams*, Serjt., *Marryat*, and *Barnewall*. The principal authority referred to was *Elderton's* case, reported in 2 Ld. Raym. 978, and also in 3 Salk. 91, 284, and 6 Mod. 73, and Holt, 590. And there were also cited 2 Inst. 548. 3 Inst. 140—1. 4 Inst. 133. Stat. 4 H. VII. c. 3. 33 H. VIII. c. 12. 1 Hawk. P. C. ch. 21, and *Rex v. Stubbs*, 3 T. R. 735. The Court after the argument directed *the case to stand over for consideration : and now

LORD ELLENBOROUGH, Ch. J. delivered judgment :

This was an action against the late Sheriff of Middlesex for a false return of *nulla bona* to a writ of *fieri facias*, delivered to him by the plaintiff for execution against the goods of his Royal Highness the Duke of Sussex. The defence made by the sheriff was, that the Duke of Sussex had no goods in his bailiwick, except certain articles belonging to his R. H. within Kensington Palace, where the execution could not, as the sheriff contended, be lawfully executed. And the question was, Whether Kensington Palace, as it is called, was, under all the circumstances of its present occupation, entitled to the exemptions and privileges which are allowed to belong to a palace in which the King resides? It will be recollected that his late Majesty King George the Second constantly resided there, as several of his predecessors had done before : that he died there : that his present Majesty, upon his accession, held his first council, and performed his first acts of state and government, as King, there. It clearly, therefore, at that period was a royal palace of his present Majesty, entitled to every exemption which can be claimed in respect of any palace belonging to his Majesty. Being then such palace, the question is, When did it cease to be so, and become no longer entitled to its former privileges? *Elderton's* case, in 2 Ld. Raym. 981, is the only reported case to be found, which bears any resemblance to the present. The questions which occur in this case were in some degree handled and discussed, but not decided in that case. Three Justices, POWELL, POWYS, and GOULD, are there stated to have agreed, " that the privilege *of the palace (Whitehall) remained, though the Queen (the case occurred in the 2nd of Queen Anne) were not resident." HOLT, Ch. J. in Lord Raymond's report of the case,

[*580]

WINTER
v.
MILES.

says, "If the Court be kept there, though the Queen's person be not present, it is a residence: but when the Queen, and the whole Court, and all the officers, are removed, has it then the privilege of a palace?" And in another report of the same case, in 3 Salk. 284, Lord Holt is stated to have held, that where there was a total absence, as in the principal case, "where the Queen was neither present in person, nor by her domestics, or any of her family, the place was not privileged." And indeed if his Majesty were, in the case now before us, neither actually nor virtually present at Kensington; neither in his royal person, nor by his officers, domestics, or any of his family, according to Lord Holt's language, it would be difficult to say that such a place was entitled to the privileges of a royal palace; and much more so, if the palace were so occupied by others as that his Majesty could not immediately return and reside there in his own person, if he were pleased to do so. But it appears by the evidence of Mrs. Steele, who lived at Kensington Palace as a servant to the Duke of Sussex, that "there were state apartments there, and a throne, &c.: that those apartments were used by nobody else; that they were reserved for his Majesty, and some for his officers; that the apartments occupied by the Duke of Sussex were the apartments of the lord chamberlain; and that his royal highness, (who as a member of his Majesty's family came directly within the terms of Lord Holt's proposition, in the report in Salkeld) used the furniture which was furnished for the lord chamberlain; that there are servants, housekeeper, &c. of his Majesty regularly there; and a guard in front of the palace; that the palace was kept up fit for his Majesty's reception if he should choose to visit it; that there was a deputy housekeeper, Mrs. Fisher, under Mrs. Strode, the principal housekeeper; that divine service was performed in the chapel there every Sunday." Another witness proved his having seen his Majesty's servants giving directions there. It was not questioned but that the gardeners employed there were paid by his Majesty, and that the produce of the gardens were applied to his Majesty's use. It was indeed proved that some families resided in parts of the palace: but from the evidence before stated, the palace was, notwithstanding this, "kept fit for his Majesty's reception at any time when he should choose to come

[*581]

WINTER
v.
MILES.

[*582]

there." Under these circumstances it cannot fairly be said, that his Majesty was not there present, within the terms used by Lord HOLT, by his " domestics, or any of his family : " nor that the palace was so occupied as to preclude the possibility of his Majesty's immediate personal return there at any time. The question of the discontinuance of any place as a palace of residence, which had at any time been so used, by the sovereign upon the throne, might involve in its discussion many extremely delicate circumstances. It would not be a very seemly matter of inquiry, whether his Majesty had by any and by what manifestations of his royal will indicated a purpose of not returning to any particular palace. So long, however, as the emblems and ensigns of his Kingly dignity are preserved in such palace, and the apartments exclusively appropriated to his use, are by his immediate servants kept ready and in a fit condition to receive him at any time ; whilst others are kept in like manner for the use of his officers ; and some are immediately *occupied by his Majesty's sons ; and no such use made of the rest of the palace as to preclude or materially interrupt his Majesty's return to it whenever he might choose so to do ; his Majesty we think may be considered as virtually residing there, within the more restrained language of Lord HOLT, as well as within the larger doctrine of the three other Judges who sat with him, when the only other case in any degree resembling the present came under judicial consideration. On these grounds we think the finding of the jury was warranted under the facts of this case ; and that a palace thus in all respects circumstanced, may be considered as a place exempt and privileged from the execution and service of the ordinary process of the law, and the defendant of course excused in not having levied, within its precincts, the execution in question. Had it indeed distinctly appeared in evidence, that the immediate personal residence of his Majesty was, by means of any occupation of the palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us. And whenever a case so circumstanced shall occur, the Court will not feel itself bound by any thing now laid down from directing a jury, that the exemption in question ought in such a case to be disallowed.

Rule discharged.

DOE, ON THE DEMISE OF SIR WILLIAM MILNER,
BART., *v.* BRIGHTWEN.

(10 East, 583—596.)

1809.
Feb. 13.

[583]

A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant; the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of England, according to the custom of the manor; though the only evidence of such custom on the Rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law.

And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to the settlement, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within twenty years after the husband's death.

And though one-third of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted; and the steward of the manor, appointed by the heir at law and her husband, had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime), for above twenty years back, debited himself with the receipt of two-thirds of the rent for the husband on account of his wife, and the remaining one-third for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that one-third, distinct from his possession of the other two-thirds as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above twenty years after the wife's death.

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release if proved or presumed would bar the copyholder's claim.

THIS ejectment was brought by the lessor of the plaintiff, claiming as heir at law, to try the title to copyhold lands called Netherlands, in the manor of Tolesbury in Essex, formerly part of the estate of Sir Thomas Darey, who left three daughters,

DOE *ex dem.* his co-heiresses, Frances, Maria, and Elizabeth. Frances in
MILNER, 1692 married Sir William Dawes, afterwards Archbishop of
BART. York, and died in 1705. The Archbishop died in 1724. Maria
v.
BRIGHTWEN. married Thomas Butler, whom she survived, and sold her share
of the premises in question to her sister Elizabeth before 1723.
Elizabeth married William Pierrepont, survived her husband,
and died, without issue, in 1758. Frances had issue by the
Archbishop Elizabeth Dawes, and Sir Darcy Dawes. Elizabeth
[*584] Dawes (through whom the lessor of the plaintiff *claimed)
married Sir William Milner (the grandfather of the lessor)
in 1716, and died in March, 1782. They had issue a son
William, who died in 1774, leaving the lessor of the plaintiff his
eldest son and heir. Sir Darcy Dawes married Sarah Roundell
in 1723, and died in 1732. Sarah Lady Dawes died in 1773.
They left a daughter Elizabeth, who in 1746 married Edwin
Lascelles, the late Lord Harewood. She died in 1764, and her
husband Lord Harewood in 1795; having had issue by her
husband a daughter who died shortly after her birth. The defend-
ant was the tenant in possession under the present Lord Harewood,
brother of the late Lord, from whom he claimed the premises in
question by devise, he having surrendered to the use of his will.

It appeared from the Court rolls that Darcy Dawes, (son and
heir of Frances Lady Dawes, then late the wife of the Rev.
Sir William Dawes,) Maria Butler, widow, and Elizabeth Pierre-
point, widow, who were the daughters and co-heirs of Sir
Thomas Darcy, Bart. were admitted in 1712 to hold to them
and their heirs as coparceners. But no surrender or admission
appeared to have been made on the part of either of those three
persons, or any one descended from either of them (including
Mrs. Lascelles) until the admission of the lessor of the plaintiff,
which was in July, 1808, in which admission he is stated to claim
as heir at law, according to the custom of the manor, of
Elizabeth Lascelles, theretofore Elizabeth Dawes, daughter of
Sir Darcy Dawes, Bart. deceased, and also as grandson and
heir of Sir William Milner, Bart. deceased.

On the part of Lord Harewood, who defended this ejectment,
[*585] was produced the settlement on marriage of *Sir Darcy Dawes
(the father of Mrs. Lascelles) with Sarah Roundell, dated in

1723, to which the Archbishop his father (who had married Frances one of the daughters and three coheiresses of Sir Thomas Darcy) and Elizabeth Pierrepont (another of the coheiresses) were also parties. From the recitals in that settlement it appeared that the three portions to which Sir Darcy Dawes, (as heir of his mother Lady Frances) Maria Butler, and Elizabeth Pierrepont, had been respectively admitted in 1712, as coheirs of Sir Thomas Darcy were thus circumstanced. In 1-3rd the Archbishop had an interest for 99 years determinable on his life; the inheritance being vested in his son Darcy. And in this third an estate for life was limited by the settlement to Sarah Roundell: but the deed recites that no surrender could be made of such third part to the uses of the settlement by reason of the then minority of Darcy Dawes, he not being specifically enabled to make a surrender by the private Act of Parliament which had been passed to authorize the settlement during his minority. Therefore the Archbishop and his son Darcy covenanted with the trustees that Darcy Dawes would when of age surrender this 1-3rd to the uses of the settlement. No such surrender however was ever made. As to the other 2-3rds, the settlement recited that Elizabeth Pierrepont had purchased her sister Maria Butler's 1-3rd, and was then in possession of both. Sarah Roundell (Lady Dawes) continued in the perception of 1-3rd of the rents of this copyhold till her death in 1773. Another instrument proved was the marriage settlement in 1746 of the late Lord Harewood (then Edwin Lascelles) with Elizabeth, the daughter of Sir Darcy Dawes, in which it is recited that the said Elizabeth was entitled to certain lands (comprising those in question) partly in possession, and partly *expectant on the death of Elizabeth Pierrepont, and in part also expectant on the death of her mother Sarah, widow of her father: that the said Elizabeth Dawes being then under age and incapable of making a settlement, it was covenanted that all her said property in possession or reversion should be settled afterwards; and that all the property moving from either party should be ultimately limited on failure of issue to the survivor of Mr. and Mrs. Lascelles in fee. These trusts and covenants were accordingly carried into execution by a subsequent deed of the 25th of

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

[*586]

DOE ex dem. MILNER, BART.
 v.
 BRIGHTWEN.

October, 1750, after Mrs. Lascelles came of age, when similar trusts were created. Mr. and Mrs. Lascelles levied a fine of the freehold estates in settlement, of Mich. 24 Geo. II., and in 1766 Mr. Lascelles, after the death of his wife, who died in 1764, but during the life of her mother Sarah Lady Dawes, who lived till 1773, was admitted to the copyhold in question, by an entry which stated that he claimed to be admitted to all the three portions, by virtue of the settlement upon his marriage with Elizabeth Dawes; the *habendum* on such admission being to Edwin Lascelles, pursuant to the said marriage settlement. It appeared from the accounts of a deceased steward of the manor and of the lands in question, that in 1770 he had charged himself thus: "Golden Griggs (the steward) Dr. to Edwin Lascelles Esq. and Lady Dawes (meaning Sarah Lady Dawes), for rents received of C. Richards (the tenant) a year's rent 42*l.* to Michaelmas, 1769, two-thirds—Edwin Lascelles Esq. one-third—Lady Dawes, of all the receipts."

[*587] A question then arose whether, though there had been no surrender to the uses of the settlements, the possession of Edwin Lascelles, (the late lord Harewood) grounded upon his admission in 1776, were not at any rate an adverse *possession to the plaintiff's claim, as to the 2-3rds, from that period, and as to the other third, from the death of Sarah Lady Dawes in 1773. To rebut which it was alleged, on the part of the plaintiff, that the late Lord Harewood had in him a curtesy estate by the custom, from the death of his wife in 1764 to his own death in 1795, which would have been a good defence to any ejectment brought by the lessor of the plaintiff as heir at law, or those under whom he claimed. In answer to which it was insisted on the part of the defendant, that in order to constitute a right to an estate by curtesy, it was in all cases necessary for the wife to have been admitted† to the copyhold in her lifetime, (which she was not in this instance,) and that such was the custom of this particular manor: as to which the evidence stood thus. The steward of the manor proved that tenancy by the curtesy of England prevailed by custom in this manor; but that in all the instances he had found on the court rolls, from whence he derived his

† See *Ever v. Aston*, Moor, 271, and 1 And. 192.

knowledge, the wife had been previously admitted ; though there was no known distinction of that sort ; nor did he know of a husband's enjoying without being himself admitted after his wife's death. And he produced three instances from the rolls. The first was that of Samuel Payne, who was admitted in October, 1766, on the death of his wife, who had herself been admitted in December, 1751. The second was from an entry of the 7th of October, 1766, which recites that Sarah the wife of Samuel Clay had been admitted to her and her heirs ; and that she and her husband had surrendered to the use of her will : and at this Court it was presented that Sarah had died seised of the premises, and Samuel *Clay informed the Court that his wife had made no will, and prayed to be admitted by the curtesy of England, and according to the custom. The third was an entry of the 4th of September, 1798, by which it appeared that Susannah Harvey, having been admitted, had died, and that her husband was admitted tenant by the curtesy and by the custom. The steward also said, that it did not appear from the rolls whether or not it were essential to the claim of a tenant by the curtesy that there should have been issue born. Upon this part of the case the Lord Chief Baron considered that the previous admission of the wife was not necessary ; the admission of the husband being, as he conceived, analogous to an admission upon a descent. In neither case does any thing move from the lord, or any surrenderor ; and the curtesy estate was permitted to obtain by reason of the inheritable capacity of the child when born, and was continued in the person of the husband during his life ; and the want of admission of the mother would have been no objection to the claim of the child to inherit if it had lived. And as to the steward's not knowing of any distinction of the sort contended for ; the learned Judge considered the evidence to be no more than this, that he knew of no reputation in the manor to that effect : and the fact of admission of the wives in the three instances produced, which were the foundation of the steward's knowledge on the subject, he thought of little weight ; as in the greater number of instances it would happen that women entitled to copyholds would be admitted, as they ought and were compellable to be : and there was no evidence of

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

[*588]

DOE *ex dem.*
MILNER,
BART.
v.
BRIGHTWEN.

[*589]

any husband's claim having been rejected on the ground of the non-admission of his wife. And the mere fact of the three husbands, in the instances adduced, having been admitted after the death of their *wives, appeared to the learned Judge not to have sufficiently established that qualifying restriction to form a part of the custom.

Another objection was, that the seisin of Mrs. Lascelles was not sufficiently proved, inasmuch as the earliest receipt of rent proved was in 1770, for a period subsequent to her death in 1764. But the Lord Chief Baron thought that, as the legal interest in this estate descended upon Mrs. Lascelles upon the death of her father Sir Darcy Dawes in 1732 as to 1-3rd, and as to the other 2-3rds, on the death of Elizabeth Pierrepont in 1758, and that the steward of the estate had been long dead; and that, as there was no proof that the rents had been paid to any other person; such payment in 1770 was reasonable evidence of the receipt of prior rents by Mr. Lascelles in the lifetime of his wife, and was reasonable evidence also of the perception of 1-3rd part of them by Sarah Lady Dawes. That at law the trusts of the settlement of Sarah Lady Dawes in 1723, and of that of 1746, could not be adverted to, as they created interests purely equitable, and no surrenders had been made to the uses of either of them: and therefore the only point for consideration at law was as to the course of descent of the three undivided parts of the copyhold. With respect to the 1-3rd to which Maria Butler was admitted in 1712, and which was purchased of her before 1723 by Elizabeth Pierrepont her sister; and with respect to the 1-3rd to which Elizabeth Pierrepont herself was admitted at the same time; it seemed clear that those two portions had descended upon their nephew Sir Darcy Dawes, and from him upon his daughter Mrs. Lascelles; and her husband Mr. Lascelles having had issue inheritable by her, the learned Judge thought would have entitled him to admission as tenant by the *curtesy, if the objections made on the part of the defendant were not well founded; and that upon the expiration of the husband's curtesy estate by his death in 1795 without issue, the legal estate descended upon Sir William Milner as heir of Elizabeth Lascelles.

[*590]

But it was urged, that the defendant was at all events entitled to a verdict for the remaining third, to which Frances Lady Dawes, the common ancestor of all these parties, was admitted in 1712, and in which Sarah Lady Dawes, the wife of Sir Darcy, had an equitable interest for life under her marriage settlement, which terminated with her life in 1773; and of which Mr. Lascelles had an adverse possession commencing upon his admission to the entirety in 1766. But the Lord Chief Baron was of opinion, that as no surrender had been made to the uses of that settlement, he could not at law take notice of the equitable agreement which the parties had thought fit to execute by handing over to Sarah Lady Dawes the rents and profits of this 1-3rd during her life. That upon the death of Sir Darcy Dawes in 1792, to whom the legal interest of this third had descended from his mother, it also descended on his only child Mrs. Lascelles, and that her husband had also become entitled to a curtesy estate in this third, as well as in the two other thirds.

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

It was then contended for the defendant, that a release from those under whom Sir Wm. Milner claimed ought to be presumed after so long a time. But the Lord Chief Baron was of opinion, that although Mr. Lascelles had in fact been admitted by the lord upon a title purely equitable, and if that had been his only title, his possession must have been considered as adverse; as an equitable title, was to that purpose no title whatever; yet as it appeared to him *that the legal title in all the three portions had centered in Elizabeth Lascelles Lady Harewood, a curtesy estate accrued to her husband in the whole; and that no presumption could take place of his possessing the estate by virtue of a release grounded on some other title. And if on the other hand he were to be considered as having been in possession adversely for above 20 years, he did not require the aid of any such presumption for his defence.

[*591]

Upon the whole the learned Judge was of opinion, that, dismissing the consideration of all equitable interests not grounded on any surrender, so as to clothe the trustees with the legal estate, the legal inheritance of the three undivided parts to which Sir Darcy Dawes (in right of his mother Frances) Maria Butler and Elizabeth Pierrepont were admitted in 1712,

DOE ex dem. centered first in Elizabeth Lascelles, (Lady Harewood;) that her
MILNER, husband became tenant by the curtesy according to the custom
BART. of the manor; and that by his death in 1795 the same became
v. vested in the present lessor of the plaintiff as heir at law of Lady
BRIGHTWEN. Harewood. And he was also of opinion, that possession on the
part of her husband for more than 20 years, in order to bar the
lessor of the plaintiff, ought to have been an adverse possession
only: but that if there were in him a good legal title, which
would have furnished a clear defence to any ejectment brought
against him during his life, no laches could be imputed to the
party in whom the fee rested, for not having proceeded before
the expiration of 20 years, or at any time before the death of
the tenant by the curtesy. And on this direction a verdict
passed for the plaintiff.

[532] A new trial was moved for in last Michaelmas Term, in order
to take the opinion of the Court upon these several points,
against which *Shepherd*, Serjt., *Garrow*, *Lawes*, and *Pitcairn*,
shewed cause in this Term; and the *Attorney-General*, *Marryat*,
and *Gurney* were heard in support of the rule, in the absence of
Lord Ellenborough, who was indisposed. The Court took time
to consider of their judgment, which was now delivered by

GROSE, J. :

This was an ejectment for certain copyhold premises in Essex,
which was tried before the Lord Chief Baron at the last assizes
at Chelmsford, in which a verdict was found generally for the
plaintiff. A rule was obtained in Michaelmas Term last on
behalf of the defendant, to shew cause why there should not be a
new trial. The matter came on to be argued on the second day
of this Term, in the absence of my Lord Chief Justice. By the
report it appeared that the lessor of the plaintiff claimed as heir
at law of Mrs. Lascelles, who was heir at law of Sir Darcy
Dawes, Maria Butler, and Elizabeth Pierrepont, who had been
admitted to these premises in 1712, to hold to them and their
heirs, and which premises, on their deaths, descended to Mrs.
Lascelles as their heir at law. But no admission to the premises
in question appeared on the Court rolls from the time of the
admission of Sir Darcy Dawes, Maria Butler, and Elizabeth

Pierrepoint, in 1712, down to the year 1766, when Mr. Lascelles was admitted to the premises, to hold to him and his heirs; and afterwards, in 1807 or 1808, the lessor of the plaintiff was admitted to the same premises. Mrs. Lascelles died in 1764, leaving her husband Edwin Lascelles, afterwards Lord Harewood, her surviving, and having had *issue by him a daughter, who had died within a year after her birth. Lord Harewood lived till 1795.

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

[*593]

On the part of the defendant, who claimed under the present Lord Harewood, it was contended, 1st, that here had been an adverse possession upon the death of Mrs. Lascelles in 1764, upwards of 40 years. To this it was answered, that by the custom of the manor the husband was entitled to hold the copyhold tenements of his wife, after her death, for his life, in the nature of tenant by the curtesy; and that Lord Harewood having survived his wife, and lived till 1795, there was no possession adverse to the title of the lessor of the plaintiff till after that time; inasmuch as the heir at law of Mrs. Lascelles could not recover the possession of the premises while her husband's estate by the curtesy existed. And to prove the custom of the manor as to the right of the husband, in the nature of tenant by the curtesy, three entries were read from the Court rolls: the first, an admission of Samuel Payne in October, 1766, on the death of his wife, who had been herself admitted in December, 1751. The second, of the 7th of October, 1766, which recited that Sarah the wife of Samuel Clay had been admitted to her and her heirs, and that she and her husband had surrendered to the use of her will: and it was presented that Sarah had died seised of the premises; and Samuel Clay informed the Court that his wife had made no will, and prayed to be admitted by the curtesy of England and according to the custom. The third, of the 4th of September, 1798, by which it appeared that Susannah Harvey, having been admitted, had died; and that her husband was admitted tenant by the curtesy and by the custom. To this evidence of the custom it was objected on the part of the defendant, that it appeared from the three entries above *stated, that the wife had been previously admitted; and as there was no evidence of the custom but these

[*594]

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

entries on the rolls, there did not appear any custom for the husband to enjoy as tenant by the curtesy, except where the wife had been in her lifetime admitted; which was not the case here, as Mrs. Lascelles had never been admitted, and therefore her husband could not bring himself within the custom. But we think on this point, that the admission of the wife is not a necessary ingredient by the custom to entitle the husband to hold for his life, in cases where the title of the wife is complete without admission by the general law of copyholds; as is the case where her title is as heir; in which case any person may derive title through her by operation of law, without admittance; and the title of the husband is by operation of law. In the present case Mrs. Lascelles's title was as heir to the three coparceners: her title was complete, without admission, to all purposes, except as against the lord, with respect to his right to his fine: and therefore we think that the entries given in evidence were sufficient to support the custom of tenancy by the curtesy, without the qualification of admittance of the wife, inasmuch as her title was such as not to require admittance to perfect it.

The plaintiff then proved in evidence the accounts of a former steward of this estate in 1770, now deceased, in which he charges himself thus; "Golden Griggs (the steward) Dr. to Edwin Lascelles Esq. and Lady Dawes, for rents received of C. Richardson (the tenant) a year's rent 42*l.* to Michaelmas, 1769. —Two-thirds, Edwin Lascelles Esq.—one-third, Lady Dawes." This Lady Dawes was the mother of Mrs. Lascelles; to which Lady Dawes a life estate had been limited on her marriage in one-third part of the premises in question; but, for want *of a surrender, the limitations of that settlement, as to the copyhold part, were not valid at law. And on this evidence it was contended for the defendant, that although it afforded fair ground for the jury to find Mrs. Lascelles in her lifetime, and afterwards Mr. Lascelles, in possession of two-thirds of the premises till his death, by receipt of two-thirds of the rents and profits; yet it shewed them out of possession of the remaining one-third, of which Lady Dawes was in possession, which possession was adverse to the lessor of the plaintiff. And that at all events therefore the defendant is entitled to a verdict in his

favour as to this one-third. But on this point we think that no distinction can be made between the two-thirds, and the one-third ; for the payment of the one-third of the rents, being made to Lady Dawes under her equitable title by the steward of the whole estate, must be considered as a payment made to her by the order and with the consent of the person entitled at law to the whole, in consideration of the equitable claim, that is, by Mrs. Lascelles in her lifetime, and Mr. Lascelles after her death ; and amounts to the same thing as if they had received the whole rent, and afterwards paid one-third to another person to whom they had by an instrument not valid in law agreed to pay it.

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

The third objection made by the defendant to the plaintiff's title to recover, is that here was ground to presume a release from Sir Wm. Milner, or some person under whom he claimed : and it was correctly stated at the bar that although copyhold premises can only pass by surrender, and not by release, yet that a release given by a person claiming title to a person in actual possession will extinguish such releasor's title or claim : and that in this case Mr. Lascelles having been actually admitted tenant on the court rolls in 1766, and *in possession of the estate, was capable of taking a release from the lessor of the plaintiff, Sir Wm. Milner, or from his grandfather, who survived his father and died in 1782. On this point, however, we do not see sufficient ground for presuming such release : for Sir Wm. Milner, the grandfather, died during the continuance of the estate by curtesy of the late Lord Harewood, during which time the grandfather, Sir Wm. Milner, could not have set up any claim to the possession of this estate : and from the death of the late Lord Harewood to the present time the title has been in the present lessor of the plaintiff, from whom a release shall not be presumed, especially when he might, by proceedings in equity, be called on to discover whether such release were ever executed by him. We therefore think that the verdict in favour of the plaintiff for the whole is right, and that the rule for the new trial should be discharged.

[*596]

K. B. EASTER TERM.

1809

[1]

PRIESTLY, AND MARY HIS WIFE, v. JANE WYNNE
HUGHES, AN INFANT, AND OTHERS.

(11 East, 1—21.)

All marriages, whether of legitimate or illegitimate children, are within the general provisions of the Marriage Act, 26 Geo. II. c. 33, which requires all marriages to be by banns or licence: and, by three judges, a marriage of an illegitimate minor had by licence with the consent of her mother is void by the 11th section; the words father and mother in that section meaning legitimate parents: by GROSE, J., it is *casus omisus* in the Act, and the marriage good.†

UPON a bill filed, which came on to be heard before the Master of the Rolls, wherein it appeared that the plaintiff Mary claimed certain estates of considerable value in the counties of Merioneth and Carnarvon, as heiress at law of one Zacheus Hughes, who had an only son John Wynne Hughes, who died in the lifetime of his father; the principal question turned upon the validity of that son's marriage, whose lawful issue the defendant Jane Wynne Hughes claimed to be; and his Honour directed the following case to be made for the opinion of this Court.

[2]

On the 9th of September, 1792, a marriage was solemnized in the parish church of Denis in the county of Carnarvon between John Wynne Hughes, then above the age of 21 years, and Jane Hughes (one of the defendants) then an infant of the age of 16 years, the illegitimate child of one Jane Roberts, single woman, by Thomas Jones, who died several years before the said marriage. The marriage was had by licence, and without the publication of banns, but the licence was obtained and the marriage had with the consent of Jane Roberts, but without the consent of any guardian of the person of Jane Hughes appointed by the Court of Chancery. After the marriage John Wynne Hughes and Jane Hughes had issue the defendant, Jane Wynne Hughes, and no other child. On the 30th of January, 1795,

† See now 4 Geo. IV. c. 76, s. 16, which is nearly similar to the section above quoted. But *quære* whether the decision would now be followed. See on an analogous question, the cases of

R. v. Nash (1883) 10 Q. B. D. 454, 52 L. J. Q. B. 442, 48 L. T. 447; *Barnardo v. McHugh*, '91, A. C. 388, 65 L. T. 423.—R. C.

PRIESTLY
v.
HUGHES.

John Wynne Hughes died ; and on the 10th of February, 1796, Zacheus Hughes, the father of John Wynne Hughes, died intestate, and seised in fee of certain real estates. The question was, whether the marriage between John Wynne Hughes and Jane Hughes the mother, on the 9th of September, 1792, in manner aforesaid, were a good and lawful marriage, to entitle Jane Wynne Hughes to succeed as heir to the real estates of which Zacheus Hughes died seised ; or whether such marriage were not void by the Marriage Act, 26 Geo. II. c. 33.

This case was first argued in Easter Term 48 Geo. III. by *Owen* for the plaintiffs, and *Williams*, Serjt. for the defendants ; and again in Hilary Term last by *Lens*, Serjt. for the plaintiffs, and the *Attorney-General* for the defendants.

The stat. 26 Geo. II. c. 33, for better preventing of clandestine marriages, prescribes (s. 1) the manner and place in which banns of matrimony shall be published, *and enacts, “ that all other the rules prescribed by the rubrick concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed.” Sect. 3 provides that no minister shall be punishable for solemnizing marriages of infants “ without consent of parents or guardians, whose consent is required by law, unless he shall have notice of the dissent of such parents or guardians ; ” and such dissent publicly declared at the time in the church where the banns are published shall avoid them. Sect. 4 regulates the granting of licences of marriage by any ordinary or other person having authority to grant them. And sect. 6 saves the right of the Archbishop of Canterbury to grant special licences. Sect. 8 enacts that “ all marriages solemnized in any other place than a church or such public chapel, unless by special licence as aforesaid, or that shall be solemnized without publication of banns or licence of marriage from a person having authority to grant the same first had, shall be null and void to all intents and purposes whatsoever.” And then sect. 11 (on which the question turned) enacts “ that all marriages solemnized by licence, where either of the parties (not being a widower or widow) shall be under the age of 21 years, which shall be had without the consent of the father of such of the parties so under age, (if then living,) first had

[*3]

PRIESTLY
F.
HUGHES.

[*4]

and obtained ; or, if dead, of the guardian or guardians lawfully appointed, or one of them ; and in case there shall be no such guardian or guardians, then of the mother, if living and unmarried ; or if there shall be no mother living and unmarried, then of a guardian of the person appointed by the Court of Chancery shall be absolutely null and void to all intents and purposes whatsoever.” *Sect. 12, reciting that the guardian or mother of the party so under age, may be *non compos*, or beyond seas, or unduly refuse their consent to a proper marriage, enables the Lord Chancellor, &c. on petition to authorise the same, as if such the guardian or mother had consented. Sect. 15 gives a form for the marriage register required to be kept, which mentions the “ consent of parents, guardians,” &c.

The questions made in argument were two ; 1st, Whether illegitimate children were bound by all or any of the provisions of the Marriage Act, and particularly by those in the 11th section : and if they were, then, 2ndly, Whether the consent of a natural father or mother to the obtaining of a marriage licence for their infant child would satisfy the words father and mother, as used in that clause.

For the plaintiffs it was contended, that the 8th section, enacting that all marriages solemnized without banns, or licence, should be void, necessarily included the marriages of illegitimate as well as of legitimate children ; and both were equally within the general policy of the law, which was for the prevention of clandestine marriage, and to protect infants from surprise and imposition in contracting matrimony. The Act is framed with reference to the ancient approved usages and discipline of the Church as to the manner of celebrating marriages ; the common and regular manner of doing which is by banns, and in that mode of celebration a bastard would have no more difficulty than any other person. But the Act also recognises another mode, by licence, which was practised before in the Church, not as a matter of right, but indulgence, granted upon special application and for good cause ; and for which the consent of lawful *parents, authenticated upon oath, was an indispensable requisite ; on pain of avoidance of the licence, as well as of

[*5]

ecclesiastical punishment.† Then the Act, allowing of marriages by the one mode as well as by the other, also imposes a condition upon the party obtaining the licence, which must be complied with in order to make it effectual, and that, by the 11th section, is the consent of the father of such party, if living; or, if dead, of the guardian lawfully appointed; or if no such guardian, then of the mother, if living and unmarried; or, if no such mother, then of a guardian appointed by the Court of Chancery. Now it is no argument to say that if some of these required consents cannot be obtained by a bastard, therefore he is absolved from the necessity of having any consent whatever for obtaining his licence; for the 8th section having first avoided all marriages solemnized without banns or licence; which would clearly include the marriages of bastards; the 11th section avoiding all marriages by licence, unless with the consent therein required, must necessarily also include all such persons. Nor will it follow, if the words father, guardian lawfully appointed, and mother, used in that clause, must be confined to legitimate father and mother, and guardian appointed by a legitimate father, that a bastard cannot be married by licence; because a guardian may still be appointed by the Court of Chancery to consent for such a person: and it is well known that since the Marriage Act that Court is in the habitual practice of appointing guardians for that purpose; and that, frequently upon the application of the natural parents: and the very existence of such *a practice in that Court gives a sanction to the argument for the necessity of it. In *The King v. The Inhabitants of Hodnett*,‡ the marriage by licence of an illegitimate infant, to which there was no consent of either parents or guardian of any description, was held to be void, within the 11th clause of the Act. And in the case of *Horner v. Liddiard*,§ it was expressly decided by Sir Wm. Scott, after much deliberation, that bastards were bound by the provisions of that clause. And upon this point of the argument the case of *The King v. Edmonton*|| is not at variance with those decisions.

PRIESTLY
*.
HUGHES.

[*6]

† Canon 101, 103, 104; 2 Burn's
Eccl. Law, tit. Marriage-Licence.
‡ 1 T. B. 96.

§ Report by Dr. Croke.
|| E. 24 Geo. III. B. R. 2 Const.
85.

PRIESTLY
r.
HUGHES.

The next and most contested question was, whether the consent of the natural mother to the marriage licence after the death of the putative father, (and there being no guardian appointed, even if such an appointment could lawfully have been made by the putative father) would satisfy the words of the 11th clause; or whether the terms father and mother there used must not be taken in their strict legal sense, as denoting legitimate parents of children born in wedlock. The plaintiffs' counsel contended for the latter sense, in which sense the legislature, they said, (following the principle of the common law,) was always to be understood when speaking generally of fathers, mothers and children. The common law considers a bastard as *nullius filius*. And the stat. 18 Eliz. c. 3, for the first time recognized the relation of an illegitimate child to its parents; but this was only for the purpose of burthening the parents with the maintenance of the child in exoneration of the parish: and the second section of that Act describes them as guilty of an offence against the laws of *God and man. Besides it only uses the terms "reputed father," and "bastard child." The stat. 13 & 14 Car. II. s. 7, making further provision for the same purpose, uses the terms "putative father, and lewd mothers of bastard children." On the other hand, bastards have been held† not to be within the stat. 32 Hen. VIII. c. 1, enabling persons holding lands in chivalry to dispose of 2-3rds thereof in advancement of children. And the stat. 48 Eliz. c. 2, s. 7, which requires the father and grandfather, and the mother and grandmother of poor children to contribute if of ability to their relief, has been held‡ not to extend to a putative grandfather. Two instances only are relied upon, in favour of the defendants, as leading to a different conclusion: the first is on the construction of the statutes 25 Hen. VIII. c. 22, s. 3, and 28 Hen. VIII. c. 16, s. 2,§ relative to prohibiting marriages within the Levitical degrees only, which

† *Thornton's case*, Dy. 345, a.

‡ *Rex v. Reeve*, 2 Bulstr. 344, was cited; but the order on the reputed grandfather seems to have been discharged rather on a collateral ground, as he was bound over again to appear at the next Quarter Sessions. An

opinion, however, to the effect stated is clearly expressed by Whitlock and Croke, Justices, in the case of *The City of Westminster v. Gerrard*, p. 346 of the same book.

§ And see 32 Hen. VIII. c. 38.

[*7]

speak of father, mother, brother, sister, &c.: and in *Haines v. Jeffreys*,† on motion for a prohibition to the ecclesiastical court to stay proceedings there against a man for marrying his sister's bastard, the Court appears to have considered that such a marriage was within the Levitical degrees. Whether this were ultimately decided does not with certainty appear; some of the reports of the case saying that the matter was adjourned: but the opinion thrown out proceeded wholly on the ground of *the particular subject matter of the law, the intent of which was to prohibit any connubial approach between persons of the same natural blood, and not merely of the same civil or legal blood. And what is said in *The Queen v. Chafin*‡ is to the same purpose. Those statutes of Hen. VIII. were passed in order to enforce the ecclesiastical law, to which they referred, and therefore the construction was necessarily to be governed by that law; and the whole argument proceeded on the foundation that the ecclesiastical law, concerning the consanguinity of persons within the Levitical degrees, extended to illegitimate as well as legitimate relations; which appears by 1 Gibs. Cod. 413, (2nd edit.) The other instance relied on is the construction put upon the stat. 4 & 5 Ph. & M. c. 8, s. 3, which inflicts punishment on such as unlawfully take any maid or woman child unmarried within the age of 16 out of the possession and against the will of the father or mother of such child, or out of the possession and against the will of such person as then shall happen to have by any lawful ways or means the order, keeping, education or governance of any such maiden or woman child: and in Strange's report§ of the case of *The King v. Cornforth* and others, it is said that the Court granted an information against the defendants for taking away a natural daughter under 16, under the care of her putative father; being of opinion that it was within that section of the Act. But this might well have been decided upon the latter words of it; as the putative father has a natural right|| to the

PRIESTLY
v.
HUGHES.

[*3]

+ Com. Rep. 2; 1 Ld. Ray. 68; 5 Mod. 168, and Comb. 356.

† 3 Salk. 66.

§ Hil. 15 Geo. II.; 2 Stra. 1162.

|| The putative father, long before

that determination, and at least since the statute 18 Eliz. and subsequent statutes, was chargeable with the maintenance and care of the bastard child. These statutes speak of the offence of the reputed father and

PRIESTLY
v.
HUGHES.

[*9]

[*10]

care and education of his child ; and this *was a taking of the child from the possession and against the will of a person having by lawful means the governance of her. And it appears from another report† of *the case that it was decided on that ground.

[*9, n.]

mother leaving such children to be kept at the charge of the pariah ; which seems to imply that they have a duty imposed *on them not to leave such children to be a charge on the parish ; and that they have the lawful keeping of them at least till dispossessed of that charge by the Crown. Vide *Newland v. Osman*, Tr. 27 Geo. II. ; 1 Const. 406, and Sayer, 93 ; 1 Burn's Just. tit. Bastard ; and vide *Rex v. Soper*, 2 R. R. 597 (5 T. R. 278) ; *Rex v. Dr. Mosely*, 7 R. R. 695, n. (5 East, 224, n.) ; *Rex v. Hopkins*, 8 R. R. 686 (7 East, 579) ; and *Ward v. St. Paul*, 2 Br. C. C. 583 ; and vide what is said by Sir Wm. Scott in *Horner v. Liddiard*, Dr. Croke's Rep. 174, 5.

[*10, n.]

† The book referred to was 1 Const's Bott, 405, tit. Bastards, which cites the case from MS. That this was the true ground of the decision is also confirmed by two MS. reports of the same case in my possession ; one by Mr. Ford, the other by Mr. Short, a cotemporary at the bar. In the latter, the judgment of the Court is thus briefly, but intelligibly stated : "*Curia*. The point of the Act is not whether the lady is legitimate or not, but the taking her from the possession of a person having by lawful means the government of her. The putative father of a natural child has a natural right to the care and education of it, and it is an act of humanity in him so to do ; and he has therefore the care of it by lawful means ; and the taking her from his possession is the abuse within the Act. Information granted."

Mr. Ford's note is, as usual, most full and satisfactory :—

THE KING v. CORNFORTH.—An information was moved for against the defendant and others for taking and carrying away one Mary Boone, then under the age of sixteen years, out of the custody of her father, and marrying her without his consent to the defendant Cornforth. On shewing cause, it was sworn by several affidavits, that Mary Boone was an illegitimate child ; and therefore it was insisted that this was neither an offence at common law, nor against the stat. 4 & 5 Phil. & M. c. 8. That a bastard was considered in law as the child of no particular person, nor could any one be her guardian either by common law or by testament. That her reputed father could not have ravishment of ward at common law, nor any remedy whatsoever for disparagement of marriage. That he was neither guardian by nature, nor nurture, and so could not be within the intent and meaning of the Act of Parliament, which is declaratory *of the common law ; and, that to bring her within the words, &c. she ought to be an heiress. *Sed vide* the stat. 5 P. & M. c. 8.

E contra, it was insisted, that this was an offence both at common law and within the statute. As to the statute, it might be the first primary intent of it to protect young heiresses or inheritors ; but both the preamble and the enacting part of it have a much larger view and extent. The words of the preamble are "maidens, and women children, as well such as be heirs apparent to their ancestors, as others," &c. Then follows the enacting part (s. 2.) That it shall not be lawful to take and convey away any maid or woman child

If these decisions upon the statutes of Hen. VIII. and Philip and Mary beshewn to have no fair bearing upon the present question, *and the rule of law remain unshaken, that the general terms father, mother, and child, used in Acts of Parliament, must be taken to mean legitimate relations of that description, *unless the

PRIESTLY

C.
HUGHES.

[*11]

[*12]

unmarried, being within the age of sixteen years, out of the possession and custody or governance, and against the will, of the father of such maid or woman child, &c. But supposing the word father in this clause should be confined to the strict legal sense of the word, to import a legitimate father only; yet the words in the next clause are large enough to extend to the present case. "That if a person or persons shall unlawfully take or convey any maid or woman child unmarried out of the possession and against the will of the father or mother, or out of the possession and against the will of such person or persons as then shall happen to have by any lawful ways or means the order, keeping, education, or governance, of any such maiden," &c. These words are general, and include all persons (not only parents and guardians, who are expressly mentioned and provided for before) but every person whatsoever that shall happen by any lawful ways and means to have the order, keeping, &c. And it cannot be denied but that the parent of an illegitimate child has by lawful ways and means the order, keeping, &c. The statute 18 Eliz. calls the parent of an illegitimate child the father, and obliges him to maintain and provide for it, and nature equally obliges him to provide for such children, as if they were legitimate. As to the common law; the offence that is here charged against the defendants is in nature of a conspiracy, which has always been considered as an offence at common law; it was so

declared in the case of *Lord Ossulston*; and the case of *The King v. Twisleton*, 1 Sid. 387, 1 Lev. 257, is similar to this in its circumstances.

LEE, Ch. J.:

[11, a.]

The foundation of the application to the Court is for a contrivance to do an unlawful act, by taking and conveying away a young lady under the age of sixteen years out of the possession and against the will of the person who by lawful ways and means happened to have the custody and government of her; and therefore it will not be necessary for this Court to enter into the consideration of that part of the case, Whether this young lady was the legitimate or illegitimate child of Mr. Boone; because that is not the foundation upon which this Court doth always proceed in cases of this nature. In regard to the fact, that is not denied; that the defendant came to Mr. Boone's house with a number of people in order to take and carry away this young lady; of his bribing and corrupting the servants; of swearing that the young lady was twenty-one years of age, in order to procure a license, when he had full knowledge to the contrary; that this was against the will of Mr. Boone, who had educated this young lady as his daughter, and under whose custody and government she then was. And as to the willingness and consent of the child to go with the defendant and marry him, that makes no difference at all, but is a circumstance taken notice of by the statute, (viz.) That maids and young women un-

PRIESTLY
 t.
 HUGHES.

contrary be expressed, or of necessity to be implied from the subject matter, or by reference to some other law which excludes the distinction; this brings the case to the true construction of the Marriage Act itself, which has these general words in the 11th section, and must therefore be taken to mean legitimate parents and children, unless the contrary be expressed on the face of the Act, or must necessarily be implied. It must be admitted that a construction favourable to the defendant J. W. Hughes was put upon this clause of the Act in *The King v. Edmonton*,† by two at least of the Judges who decided that case; who relied however principally on *Cornforth's* case, which has been sufficiently distinguished from this: but the third; said, it was not necessary to give a decisive opinion on the construction of the Marriage Act, for if the case were within the Act, there was nobody to consent to the licence but the putative father, and nobody else could be meant: and if the Act only extended to cases where there was a lawful father, then the case was not within it, and no consent was necessary. It is uncertain therefore on which of those alternatives the learned Judge meant to rely: and if the legal conclusion does not necessarily follow from the alternatives so stated, it lessens in this instance the weight justly attached to his opinions in general. But in *The King v. The Inhabitants of Hodnett*,§ the

married being allured and won by flattery and fair promises to contract matrimony, &c. and that was one of the principal mischiefs intended to be remedied by the statute.

CHAPPLE and WRIGHT, Justices, to the same effect.

Per CUR.: *Let the rule for an information against all the defendants be absolute.*

In addition to this I am able to state, that the two first counts in the information, which was afterwards filed, were for a conspiracy, and did not conclude "against the form of

the statute:" the third and fourth counts were framed upon the statute, with an apt conclusion; but did not state whose child she was, but merely that she was taken from the possession of J. B. he then and there having by lawful ways and means the order, keeping, education, and governance of her. The first count stated her to be the illegitimate daughter of J. B., and it had been inserted in the third and fourth, but was struck out. The defendants were afterwards convicted, fined 5*l.* and imprisoned for a year.

† E. 24 Geo. III. B. R. 2 Const. 85.

‡ Buller, J.; Lord Mansfield, Ch. J. was absent.

§ 1 T. R. 96.

marriage by licence of an illegitimate child under age was expressly held to be void within the 11th section of the Act, for want of the consent thereby required though that does not conclude the present question, because there was no consent of any person *given in that case. The authority however of *The King v. Edmonton* is directly opposed by the judgment of Sir Wm. Scott in *Horner v. Liddiard*;† for there the mother, who had been appointed guardian by the putative father, consented to the licence, and yet the marriage was decreed to be void: and also by the established practice of the Court of Chancery, since the passing of the Marriage Act, to appoint a guardian to consent to the marriage by licence of an illegitimate minor, although the natural parents were still living. It is also material to be considered that by the ecclesiastical law to which the Marriage Act necessarily refers when speaking of licences, no licence can be obtained by a minor without oath of the consent of the father if living, or if dead, of the testamentary guardian if any; and no such oath could be made by, or would be received from a natural father, who must in the same breath accuse himself of an ecclesiastical offence for which he would be punishable by that law. Neither can any other but a legal father appoint a testamentary guardian by the stat. 12 Car. II. c. 24, s. 8, as is shewn by Sir Wm. Scott in *Horner v. Liddiard*; † and the guardian interposed by the 11th section of the statute, between the father and mother, whose consent is required to the licence must be a testamentary guardian; for the only other guardian known to the law for this purpose is the one appointed by the Court of Chancery, who is mentioned after the mother in the same clause: and as the same learned Judge observed, ‡ the father and mother spoken of must be *ejusdem generis*, not a legal father and an illegal mother. And he has also pointed out the manifest inconvenience and uncertainty that would ensue from admitting the power of a putative father to bind the child *by his consent, from the difficulty in many instances of ascertaining by whom such consent must be given. By the same rule it must be admitted that the publication of banns cannot be forbidden by natural parents. The result of the

PRIESTLY
v.
HUGHES.

[*13]

[*14]

† Dr. Croke's Rep. 180.

‡ *Ib.* 173.

PRIESTLY
v.
HUGHES.

whole is, that illegitimate children are within the general provisions of the Act prohibiting marriages otherwise than by banns or licence: but the consent of fathers and mothers required by the 11th section to the validity of a marriage by licence, where the child is under age, must, upon the principle as well of the common law as of the ecclesiastical law, be understood of legitimate fathers and mothers: and no such consent having been given in this case, nor any consent by a guardian appointed by the Court of Chancery for this purpose, the consequence is that the marriage was null and void by the express enactment of the statute.

For the defendants, the case was argued in the alternative, either that natural children and their parents were within the several provisions of the Marriage Act; and then the words of the 11th section were satisfied by the consent of the natural mother Jane Hughes; the natural father being dead, and no guardian intervening: or if the words of that section comprehended only legitimate fathers and mothers; then that this was *casus omissus*, and no consent was necessary to the obtaining of the marriage licence of the illegitimate infant. First, it must be admitted that the case falls within the express words of the Act; and though the words father and mother there used must have the same relative construction; yet considering the nature of the subject matter and the avowed object of the Act, to protect the youth and inexperience of children from surprise and imposition, there is no reason for restraining the natural meaning of the words, as there may be in respect of *laws regulating the succession to property, which are always governed by legal technical rules. The consent of illegitimate parents where they are known, as in this case, is as much within the general scope and reason of the Act as that of legitimate parents, and their moral duty is the same. The Marriage Act, as Sir Wm. Scott states in *Horner v. Liddiard*,† introduced a new rule; for at common law a marriage by parties at the age of consent (14 in males, 12 in females) was good, though without the consent of parents; and even when contracted before that age, if they did not dissent when they attained it. The canons of 1603, requiring

[*15]

† P. 167 of Dr. Croke's Report.

the consent of parents to a licence, never bound the laity, but only the clergy ; and before the Marriage Act nothing was more common than for minors to marry without any such consent. The question then is, whether the Court is bound to narrow the words of a new statute law against the freedom and policy of the common law, which admitted of no restraint in this matter. The Act does not speak of ancestor or heir, or other words of legal technical signification, but of father and mother, which are terms of mere natural relation: *hæres est nomen juris* ; *filius est nomen naturæ* : the word “guardian” was interposed merely to meet the provision of the stat. 12 Car. II. c. 24, s. 8, enabling a father to appoint a testamentary guardian to his children. What is said in the books, as to a bastard being *filius nullius*, is merely applied to real descent and personal succession : but according to Lord Coke,† a bastard may take as a purchaser by the name of the son of J. S. after he has gained a name by reputation as the son of J. S. ; and this even in a deed, where the greatest certainty is required. And *though Lord Coke goes on to say in the same place that a remainder cannot be limited to a bastard by the name of son or issue of such an one, before his birth ; yet the contrary of that was expressly adjudged in *Blodwell v. Edwards*,‡ cited in the margin of the book, where the remainder was granted to the issue, whether lawful or unlawful, of A. on the body of B. to be begotten. So in Bro. tit. Graunts, pl. 17, where baron and feme had a daughter Agnes before their marriage, and afterwards made a feoffment, with remainder to Agnes the daughter of the said baron and feme ; it was held to be a good name of purchase, and she recovered by that name in assize. If a woman, having a child before marriage by a man by whom after marriage she had other children, devise to her children ; it was considered (in Moor, 10, pl. 39) to be clear, that the bastard would take under that description, as being without doubt her child ; though it was then doubted in the case of such a devise by the man. Certainly however the bastard would take in both cases, if such appeared to be the intention of the devisor. Before the statutes

PRIESTLY
v.
HUGHES.

[*16]

† Co. Lit. 3 b.

‡ Noy, 35 ; Moor, 430 ; 2 Roll. Abr. 43, pl. 11.

PRIESTLY
 F.
 HUGHES.

[*17]

of Hen. VIII.† the courts of common law had no jurisdiction in matrimonial causes; but now, having jurisdiction to construe those statutes, they would grant a prohibition to the Ecclesiastical Court, if it attempted to impeach any marriage not within the Levitical degrees as recognized by those statutes. But it is admitted‡ that natural relations within the terms of father, mother, brother, sister, &c. there used, would be prohibited from intermarrying: and this does not rest merely on the principle on which it is put in the Ecclesiastical Court, that *moral restraints attach upon natural consanguinity, but upon the true construction of those words in the statutes of Hen. VIII., made *in pari materiâ* with the Marriage Act, as settled in the case of *Haines v. Jeffreys*.§ The argument derived from the difficulty of ascertaining the natural father applied as strongly to the statutes of Hen. VIII. as it does to the Marriage Act; but the Court thought that it was not insuperable, and that the fact might be ascertained by a jury upon evidence as in all other cases of disputed facts. The decision upon the stat. 4 & 5 Ph. & M. c. 8, followed in *The King v. Cornforth*.|| The 2nd section of that statute first gives the power to the father to bequeath or grant by his will or other act in his lifetime the order, keeping, education, or governance of his child: and it prohibits the taking such unmarried child, under 16, out of the possession and against the will of the father or of such person to whom by his will or other act in his lifetime he shall have bequeathed or granted the order, keeping, &c. of such child; with an exception of any taking, without fraud, by a master or mistress, or guardian in socage or chivalry, of such child. Then the 3rd section on which the case of *The King v. Cornforth* was decided, speaking of a taking from the possession of the father or mother, or of "such person as shall then happen to have by any lawful means the order, keeping, education, or governance" of such child, must be understood of persons appointed by the will or other act

† 25 Hen. VIII. c. 22, s. 3; 28
 Hen. VIII. c. 16, s. 2; and 32 Hen.
 VIII. c. 38.

‡ *Horner v. Liddiard*, Dr. Croke's
 Rep. 177.

§ Com. Rep. 2; 1 Ld. Ray. 68;
 5 Mod. 168, and Comb. 356.

|| 2 Stra. 1162. And *vide ante*, p.
 412 note.

PRIESTLY
v.
HUGHES.

[*18]

in the lifetime of the father, that is, after his death, and deriving their authority from him : it could not mean that the consent of a school-mistress, with whom the child happened to be placed by her natural father, would take the case out of the Act. *If therefore the natural father from whose possession the child was taken were not, as such, within the Act, it seems difficult to bring the case within it, as there was no pretence of authority from any other person named therein : and the report in *Strange* puts the decision on that ground ; and so it was considered by BULLER, J. in *The King v. Edmonton* ;† which latter case is a direct authority at law, and is so admitted to be, upon the very point now in judgment. The case of *Thoroton v. Thoroton* ‡ must also be considered as an authority on the same side. An action was first brought by the husband for criminal conversation with the wife, which was tried before Mr. Justice Grose on the Midland circuit. Mrs. Thoroton was an illegitimate child, who had been married by licence with the consent of her putative father Mr. Manners : and it was open to the defendant to have taken that objection to the marriage, if well founded ; but it was not taken. Afterwards the husband libelled in the Court of Arches for a separation for adultery, when all the circumstances appeared on the face of the libel ; and after sentence, there was an appeal to the delegates by whom the sentence for separation was confirmed : but no objection was taken to the marriage either by the civilians who argued, or by the Judges who decided the case ; though Sir Wm. Scott said,§ that he could not take upon him to assert that it did in no degree fall under the consideration of the Court in the decision of the case. As to the objection arising from the provision of the 11th section of the Marriage Act interposing the consent of a testamentary *guardian between the father and mother, because such a guardian cannot be appointed by a putative father under the stat. 12 Car. II. c. 24, s. 8 ; the reason why such an appointment could not be made under that statute, which was for the abolition of feudal tenures, was because it had relation to the descent of real

[*19]

† 2 Const. 85.

Croke's Report.

‡ Mentioned by Sir Wm. Scott,
in *Horner v. Liddiard*, p. 188 of Dr.

§ *Ib.*

PRIESTLY
v.
HUGHES.

property. Unless lands descended there could be no guardian in socage; and the 8th clause was to enable fathers to substitute guardians by will of their children for guardians in socage, and to extend the period from 14 to 21 years; but substantially they are the same.† But the words of the 11th clause of the Marriage Act are as well adapted to the case where the father has no power to appoint such a guardian, as to the case where, having such a power, he has not chosen to exercise it; for they are “in case there shall be no such guardian,” (not, “in case the father shall not appoint such guardian”) then the mother is to consent. Then the practice of the Court of Chancery in appointing guardians to consent to the marriage by licence of bastards, which is relied on, cannot press much upon the argument as to the legal construction of the statute; for it would be sufficient to account for it as a matter of abundant caution, that the question had been doubted by any professional adviser at any time: it is an *ex parte* proceeding, which could admit of no controversy; and the practice of the Court has always been to appoint the acknowledged father if living, or, if dead, the mother.

[*20]

But, 2ndly, if the natural parents cannot consent within the Act, then this is *casus omissus* altogether, and no consent was necessary. At common law no consent of parents was necessary if the parties were of the age of consent: *and the Legislature could never have intended to impose a condition on any persons which was impossible to be performed by them. Of those to whom the law denies father, mother, or testamentary guardian, the consent of such cannot be required: the consent therefore required in that clause must be confined to legitimate children, and to make the construction of it consistent and uniform, the consent of a guardian appointed by the Court of Chancery must be taken to be only substituted in the place of the consent of the father, testamentary guardian, and mother, where there might have been persons standing in those relations to the minors spoken of. Considering the object of the Act, this is a question of common sense rather than of technical construction on the words of it. If natural children be within the Act at all, they

† Vaugh. 179; *Duke of Beaufort* *Countess of Shaftesbury*, 2 P. Wms. v. *Berty*, 1 P. Wms. 704; and *Eyre* v. 107, &c.

must be within all the provisions of it ; but they must be either altogether within or altogether out of it.

PRIESTLY
v.
HUGHES.

The Court took time for consideration ; and finally the Judges, not being all agreed in opinion, the following separate certificates were sent to his Honour :

“ This case has been twice argued before us by counsel : we have considered it, and are of opinion, that all marriages, whether of legitimate or illegitimate persons, are within the general provision of the statute 26 Geo. II. c. 33 which requires all marriages to be by banns or licence ; and that the consent of the natural mother to the marriage by licence of an illegitimate minor is not a sufficient consent within the 11th section of that Act : consequently that the marriage had and solemnized between the said John Wynne Hughes and Jane the mother, on the 9th September, 1792, in manner aforesaid, was not *a good and lawful marriage, but was void by force of the said statute of 26 Geo. II. c. 33.

[*21]

“ ELLENBOROUGH.

“ S. LE BLANC.

“ J. BAYLEY.”

“ Having heard this case argued by counsel on the part of the plaintiff and defendant, and having considered the words and purview of the stat. 26 Geo. II. c. 33, and particularly of the 11th sect. of that statute, it seems to me from the words of that section, that the Legislature had in their contemplation only the marriages by licence of such legitimate children who had, or might have either parents to consent to the marriage of such children, or guardians whom the Legislature intended to substitute for such parents under different circumstances ; and that they had not in their contemplation to provide for the marriages of illegitimate children whose parents could not legally forbid the banns, if they were to be married by banns, and who could have no such parents as are intended to be described in the 11th sect. of the Act above mentioned, that is, legitimate parents, if they were to be married by licence ; and therefore that the marriage

DOE ex dem. entries on the rolls, there did not appear any custom for the
 MILNER, husband to enjoy as tenant by the curtesy, except where the
 BART. wife had been in her lifetime admitted; which was not the case
 r. here, as Mrs. Lascelles had never been admitted, and therefore
 BRIGHTWEN. her husband could not bring himself within the custom. But we
 think on this point, that the admission of the wife is not a neces-
 sary ingredient by the custom to entitle the husband to hold for
 his life, in cases where the title of the wife is complete without
 admission by the general law of copyholds; as is the case where
 her title is as heir; in which case any person may derive title
 through her by operation of law, without admittance; and the
 title of the husband is by operation of law. In the present case
 Mrs. Lascelles's title was as heir to the three coparceners: her
 title was complete, without admission, to all purposes, except as
 against the lord, with respect to his right to his fine: and there-
 fore we think that the entries given in evidence were sufficient to
 support the custom of tenancy by the curtesy, without the quali-
 fication of admittance of the wife, inasmuch as her title was
 such as not to require admittance to perfect it.

The plaintiff then proved in evidence the accounts of a former
 steward of this estate in 1770, now deceased, in which he charges
 himself thus; "Golden Griggs (the steward) Dr. to Edwin
 Lascelles Esq. and Lady Dawes, for rents received of C.
 Richardson (the tenant) a year's rent 42*l.* to Michaelmas, 1769.
 —Two-thirds, Edwin Lascelles Esq.—one-third, Lady Dawes."
 This Lady Dawes was the mother of Mrs. Lascelles; to which
 Lady Dawes a life estate had been limited on her marriage in
 one-third part of the premises in question; but, for want *of a
 surrender, the limitations of that settlement, as to the copyhold
 part, were not valid at law. And on this evidence it was
 contended for the defendant, that although it afforded fair
 ground for the jury to find Mrs. Lascelles in her lifetime, and
 afterwards Mr. Lascelles, in possession of two-thirds of the
 premises till his death, by receipt of two-thirds of the rents and
 profits; yet it shewed them out of possession of the remaining
 one-third, of which Lady Dawes was in possession, which
 possession was adverse to the lessor of the plaintiff. And that
 at all events therefore the defendant is entitled to a verdict in his

[*395]

favour as to this one-third. But on this point we think that no distinction can be made between the two-thirds, and the one-third ; for the payment of the one-third of the rents, being made to Lady Dawes under her equitable title by the steward of the whole estate, must be considered as a payment made to her by the order and with the consent of the person entitled at law to the whole, in consideration of the equitable claim, that is, by Mrs. Lascelles in her lifetime, and Mr. Lascelles after her death ; and amounts to the same thing as if they had received the whole rent, and afterwards paid one-third to another person to whom they had by an instrument not valid in law agreed to pay it.

DOE ex dem.
MILNER,
BART.
v.
BRIGHTWEN.

The third objection made by the defendant to the plaintiff's title to recover, is that here was ground to presume a release from Sir Wm. Milner, or some person under whom he claimed : and it was correctly stated at the bar that although copyhold premises can only pass by surrender, and not by release, yet that a release given by a person claiming title to a person in actual possession will extinguish such releasor's title or claim : and that in this case Mr. Lascelles having been actually admitted tenant on the court rolls in 1766, and *in possession of the estate, was capable of taking a release from the lessor of the plaintiff, Sir Wm. Milner, or from his grandfather, who survived his father and died in 1782. On this point, however, we do not see sufficient ground for presuming such release : for Sir Wm. Milner, the grandfather, died during the continuance of the estate by curtesy of the late Lord Harewood, during which time the grandfather, Sir Wm. Milner, could not have set up any claim to the possession of this estate : and from the death of the late Lord Harewood to the present time the title has been in the present lessor of the plaintiff, from whom a release shall not be presumed, especially when he might, by proceedings in equity, be called on to discover whether such release were ever executed by him. We therefore think that the verdict in favour of the plaintiff for the whole is right, and that the rule for the new trial should be discharged.

[*596]

IRWIN
v.
DEARMAN. by the defendant. But the jury under these circumstances gave 100*l.* damages.

[24]

Abbott now moved to set aside the inquisition of damages, as being greatly excessive, with respect to the general count; and having no legal foundation, with respect to the count charging in aggravation that the servant was the plaintiff's adopted daughter. The allowing of an action of this description even by a legitimate parent is an anomalous case; as enabling one person to recover damages for an injury done to another; but having been so long countenanced by the Courts in practice, it cannot now perhaps be questioned upon principle. And the extension of the remedy, in *Edmondson v. Mashell*,† to an action by an aunt with whom the niece was living, was very much doubted at the time; and the case ultimately ended in a compromise. At least that cannot be called into precedent for a further extension of the principle to the case of one who is no relation at all, but only, as the count states, by adoption, which is not recognized by our law.

LORD ELLENBOROUGH, Ch. J.:

This has always been considered as an action *sui generis*, where a person standing in the relation of a parent, or *in loco parentis*, is permitted to recover damages for an injury of this nature *ultra* the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of *Edmondson v. Mashell*, to extend to an aunt, as one standing *in loco parentis*, I think that this plaintiff, *who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him aggravated by the injury done to the object on whom he had thus placed his affection.

[*25]

Per CURIAM :

Rule refused.

† 2 T. R. 4.

FAVENC AND OTHERS v. BENNETT AND OTHERS.

(11 East, 36—42.)

1809.
April 20.

[36]

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual Bought and Sold notes (delivered over to the respective parties by the broker), of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that by a bill of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment; such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer.

THIS was an action for goods sold and delivered, and the question was, whether certain coffee, the property of the plaintiffs, which had been sold to the defendants by the intervention of the Kennions, brokers employed by the plaintiffs for that purpose, had under the circumstances been duly paid for by the defendants, who had purchased the coffee from the brokers without knowledge of their principals, by means of a bill of exchange drawn by the Kennions on the defendants, and accepted by them, for a larger amount than the value of the goods in question; the defendants having also purchased other coffees of a different owner through the like intervention of the Kennions; for which they were at the same time indebted. The particular circumstances of the case are stated hereafter. A verdict was found for the plaintiffs under the direction of Lord ELLENBOROUGH, Ch. J., before whom the cause was tried at Guildhall, after Hilary Term, 1808: and the merits of the case upon that direction were first discussed in Easter Term, 1808, upon a motion for a new trial, which in the ensuing Term was supported by *Park*, *Topping*, and *Holroyd*, and opposed by the *Attorney-General*, *Garrow*, and *Taddy*. The cases of *Fenn v. Harrison*, 8 T. R. 757, *George v. Clagett*, 7 T. R. 359,† and *Waring v. Favenck*, 1 Campb. Ni. Pri. Cas. 85,‡ were referred to in the argument. The case stood over for consideration till

† 4 R. R. 462.

‡ P. 638, *post*.

FAVENC
v.
BENNETT.

the end of Trinity Term; when the judgment of the Court was given.

[37] LORD ELLENBOROUGH, Ch. J. :

On the motion for a new trial in this cause, which was tried before me, the question was, Whether 22 hogsheads of coffee bought by Messrs. Kennion & Son, brokers, from Favenc & Co., the plaintiffs, and sold to the defendants, and which were sworn by one of Kennion's sons to have been paid for by the defendants to Kennions, the brokers, in a bill of exchange for 800*l.*, before the latter stopped payment, (which was on the 6th of July,) were so paid for, as to preclude the plaintiffs, the sellers, from afterwards demanding the price thereof from the defendants, the buyers? The brokers had sent bought and sold notes on the same day, (*i.e.* the 12th of June, the day of the sale,) to both the plaintiffs and defendants. In the sale note sent to the plaintiffs they had described themselves as the buyers from the plaintiffs, and in the bought note sent to the defendants, as the sellers to the defendants: in each there was this stipulation, "payment in a month, money, 1 per cent. discount." The plaintiffs gave the Kennions the West India Dock warrants, (which represent the goods sold, and enable the holders thereof to obtain immediate delivery of the goods therein mentioned,) on or about the day of the sale, *i.e.* the 12th of June; and the Kennions thereupon sent them to the defendants. The price of the plaintiff's coffee, after deducting the stipulated 1 per cent. discount, amounted to 707*l.* 10*s.* 8*d.* On the 15th of June, which, as far as I collect from the evidence, was three days after the brokers had delivered to the defendants, the buyers, the West India Dock warrants, without having taken any security in the mean time on the behalf of their employers, the plaintiffs, for the price of the goods, the defendants paid Kennion & Son in a bill drawn by Kennion & Son on them, *the defendants, and accepted by the defendants, payable in a month, the sum of 800*l.*, which was meant to cover the above mentioned price of the coffee in question, after deducting the 1 per cent. discount: and the difference was to be applied in part-payment for another parcel of goods sold on that same 15th of June by Kennions to the

[*38]

FAVENC
v.
BENNETT.

defendants, in another account, with which the plaintiffs had no concern, for 272*l.* 10*s.* 4*d.* This bill for 800*l.* the defendants, the acceptors, immediately discounted for the convenience of the Kennions, the drawers ; so that the Kennions thereupon became paid in cash on the 15th of June for the price of the coffees, to be paid for by the terms of the contract (*i.e.* in a month, money,) on the 12th of July following ; deducting, however, discount on the whole amount of the bill for 800*l.* down to the 18th instead of the 12th of July, including the three days of grace. The Court is desirous of being further informed, by another investigation to be had before a jury, respecting the mode of conducting sales between parties by the intervention of a broker, in order that they may judge, whether a payment made to a broker, in the manner, and under the circumstances, already stated, be such a payment as is usually made in the course of trade to a broker on account of his principal. They wish also to know with precise exactness what, in the dealings and understanding of commercial men, is meant by the stipulation “in a month, money ;” whether it be considered as importing only that the buyer shall pay for the goods in cash at the end of one month from the date of the contract ; or that the buyer, whenever he should receive the goods, either at or before the month’s end, should immediately give a bill for the amount of the price, so as to put the seller in cash for the *same at a month’s end from the date of the contract. The Court have thought it proper to suggest thus particularly the points to which it wishes the evidence to be addressed, in order that the opinion of a jury may be hereafter taken, and their own judgment ultimately formed, with better advantage and effect upon the important commercial questions which this cause embraces.

[*39]

Rule absolute for a new trial.

On the second trial, the jury were of opinion, upon the evidence, that the stipulation in the contract, of “a month, money,” meant, in the understanding of commercial men, payment at any time within a month ; and they were also of opinion that the payment in question within the month to the brokers with whom the defendants had dealt, without the knowledge of

FAVENC
v.
BENNETT. their principals, was a good payment to bind the principals;
and they therefore found a verdict for the defendants.

[*40]

The plaintiff's counsel thereupon moved in the last Term for a new trial, on the ground of the verdict being against law and evidence, and against the direction of the Lord Chief Justice. And they relied principally on an objection, which had been urged on the former occasion, and on which main stress was laid at the last trial, that there was no evidence to shew that the bill drawn by the Kennions and accepted by the defendants, and since paid, was intended at the time to cover the demand for the 22 hdds. of coffee in question. The facts were these:—The brokers sold this lot of coffee to the defendants on the 12th of June for 707*l.* 19*s.* 3*d.* (deducting the discount of 1*l.* per cent. on payment in a month, money). The brokers had also sold to the defendants another lot of coffee belonging to another person to the amount of *272*l.* 10*s.* 4*d.* Then the Kennions on the 15th of June drew the bill for 800*l.* on the defendants payable in a month, which they accepted, and which would not of course become due till the 18th of July, several days after the price of the first lot of coffee would be due by the terms of the contract of sale. This was relied on to shew that it was intended as a payment by the defendants to the Kennions on their general account, and not for the purpose of covering this demand in particular; the sum being greater, and also payable at a future time. And they also urged against this being taken as a specific payment to the brokers on account of the plaintiff's coffee, that the plaintiff could not have brought trover against the Kennions for the bill, because it was given for more than their demand: neither could they have maintained an action for money had and received; because the money was paid to the Kennions on account generally, and the sum was not sufficient to have paid both the plaintiffs and the owners of the other coffee their respective demands: and it could not depend on which of them first prosecuted their action for the amount. And how, they asked, was the amount of the bill to be apportioned between the different claimants? They also relied on a distinction between payments made to a factor, and to a broker; in the former case, unless the factor

name his principal, he is dealt with as the principal: but a broker is known to be only an agent for another, though that other may not be known: the form of the Bought and Sold notes† declares *him to be so. And though by the course of trade he may receive payment for his principal, yet such payment, in order to be binding upon the principal, must be made by the contracting party according to the terms of the contract; otherwise it cannot be taken to have been made on account of the principal, but on the general account of the broker himself. If the defendants had intended to have paid their money in discharge of any particular account, they should have declared such intention at the time, or have paid the specific sum due on that account, which must have been known to them. But by paying money generally on account to their brokers with whom they had different accounts to settle, they trusted to them, and did not thereby discharge themselves to the individual principals whom the brokers represented.

FAVENC
v.
BENNETT.

[*41]

The defendants' counsel insisted that there was evidence sufficient to warrant the jury in finding that the bill for 800*l.* drawn by the Kennions was accepted by the defendants in order to cover the 707*l.* 19*s.* 3*d.*, the price of the plaintiffs' coffee, inasmuch as it appeared that the defendants themselves had discounted their own acceptance on the 22nd of June, within the month for which time of payment was given for these coffees, and had given their cheque of that date for 797*l.* 3*s.* which was the exact amount of the 800*l.* bill, deducting the discount on the payment for the coffees within the month. But when pressed by the Court to account for the bill having been drawn for so much more than the price of the plaintiffs' coffee, if it were not meant to be a general payment of so much on the whole account between the

† This was the form of the Bought note; and the Sold note was in like form, only substituting "sold" for "bought," and addressed to Favenc & Co. instead of to the defendants:—

"Messrs. Bennett & Co.

"LONDON, 12th June, 1807.

"We have this day bought by

your order and for your account 22 hhds. Jamaica coffee, as per sample, at 5*l.* 8*s.* per cwt.—Payment in one month, money—1 per cent. discount.

"Yours, &c.

"J. KENNION & SON."

FAVENC
v.
BENNETT.

[*42]

brokers and the defendants, they said that it was a question for the jury whether the payment had not been made *to cover the plaintiffs' whole demand in the first instance, and the surplus only to be applied to the other demand. And if it were to be so taken, as they contended that the verdict of the jury warranted them to do, it would follow that the Kennions were in cash on the 22nd of June for this specific lot of coffee, and the plaintiffs their principals might then have maintained an action for money had and received against them, as upon a payment to them for the use of the plaintiffs.

LORD ELLENBOROUGH, Ch. J. :

The defendants were indebted for two parcels of coffee which they had purchased by the intervention of the Kennions, brokers ; the one parcel amounting to above 707*l.*, the other to 272*l.* and upwards. They accept a bill for 800*l.*, which is much more than either of the sums alone, but less than the two together, and there is no specific appropriation of it to either at the time : why then is the whole to be now appropriated to the plaintiffs' demand, since the insolvency of the Kennions, when the justice of the case clearly is that the payment so made to the brokers on their general account, as it seems by the evidence, should be apportioned between the respective owners of the coffee. This will cut down the plaintiffs' demand, but leave something to be recovered by them, for which they ought to have had a verdict.

The rest of the Court concurring in this view of the case, it was directed to stand over to obtain the consent of the respective parties. And, as I was informed, the matter was settled according to the apportionment recommended.

BEELEY *v.* WINGFIELD.

(11 East, 46—48.)

1809.
April 21.

[46]

A security for the fair expenses of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 Geo. III. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced, is legal.

THIS was an action on a promissory note for 42*l.*, which it appeared had been given by the defendant to a parish officer under these circumstances. The defendant was indicted at the Sessions by the parish officers for a misdemeanor in ill treating his parish apprentice: and being convicted, it was suggested to him by the chairman of the Court, that if he agreed to pay 40 guineas towards the expenses of the prosecution, he would only be imprisoned 6 months instead of 12. The note was accordingly given, and he was sentenced to 6 months imprisonment. Objection was thereupon taken at the trial before Bayley, J. at Derby, that the note given for such a consideration was illegal; which objection was over-ruled, and a verdict passed for the plaintiff, with leave to the defendant to move to set it aside, and enter a nonsuit, if the objection were well founded.

Vaughan, Serjt., now moved accordingly on two grounds. 1st, that the taking of such a composition for punishment in the particular instance was in derogation of the policy of the statute 32 Geo. III. c. 57, s. 11, which provides, in case of the ill treatment of parish apprentices by their masters in certain cases, that it shall be lawful for two justices "to compel the churchwarden and overseers, &c. to enter into a recognizance for the effectual prosecution by indictment of such master, &c. for such ill treatment of any such apprentice, &c.; and also to order the costs and expenses of such prosecution to be paid and discharged or reimbursed to such persons entering *into such recognizance as aforesaid; one moiety thereof out of the poor rates of the parish, &c. and the other moiety out of the county stock." 2ndly,

[*47]

BEELEY
v.
WINGFIELD.

On the more general ground, that this security was not given towards satisfaction of the party injured; which might be sanctioned by the practice of this Court, where they permit an injured prosecutor and a convicted defendant to talk together before sentence, with a view to promote compensation to the party injured: but this security was given in order to save the parish and county purses. In *Cole v. Gower*,† the parish officers who were authorised by the stat. 6 Geo. II. c. 31, to take security from the putative father of a bastard child, for indemnifying the parish, having taken an absolute security for a sum certain; the Court considered such absolute security to be against the policy of the law, being a different kind of security than what the law authorized.

(Lord ELLENBOROUGH, Ch. J. observed, that the stat. of Geo. II. having prescribed to the parish officers the kind of security they should take, it was a breach of their trust to take a different kind of security than what the Legislature intended. But here the statute is only in aid of their general duty to protect the poor children, put out by them as apprentices, from wrong by the persons to whom they are bound. But he asked whether in this case the defendant was prepared to shew that the suggestion of the Chairman had been made use of to secure any benefit to the parish beyond their indemnity from the fair expenses of the prosecution: which was answered in the negative. But it was suggested, that there was no obligation on the plaintiff, the then overseer, to apply the money when recovered to the use of the parish. To this, *however, his Lordship said, that the plaintiff would be considered as a trustee for the parish.)

[*48]

LORD ELLENBOROUGH, Ch. J. :

There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expenses [incurred by them in bringing the defendant to justice. It did not stifle a public pro-

† 6 East, 110.

secution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the Court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears.

BEELEY
C.
WINGFIELD.

Per CURIAM:

Rule absolute.

BUTTERFIELD v. FORRESTER.†

(11 East, 60—61.)

1809.
April 22.

[60]

One who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

THIS was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before Bayley, J. at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of

† Cited as laying down the correct rule of law, by Lord ESHER, M.B., in *The Bernina* (1887) 12 P. D. 58, 70.—B. C.

BUTTER-
FIELD
v.
FORRESTER.

his being intoxicated at the time. On this evidence BAYLEY, J. directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.

[*61] *Vaughan*, Serjt. now objected to this direction, on moving for a new trial; and referred to Buller's Ni. *Pri. 26,† where the rule is laid down, that "if a man lay logs of wood across a highway; though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

BAYLEY, J.:

The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

LORD ELLENBOROUGH, Ch. J.:

A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Per CURIAM:

Rule refused.

† The book cites Carth. 194 and do not bear on the point here in question.
451, in the margin, which references

CHAMBERS v. DONALDSON AND OTHERS.

(11 East, 65—77.)

1809.
April 25.

In trespass *quare clausum fregit*, the defendant cannot set up a *jus tertii* to rebut the mere possessory title of the plaintiff, unless he acted under the authority of such right.†

[65]

To trespass for breaking and entering the dwelling-house of the plaintiff in the parish of Mary-le-bone, &c. the defendants pleaded that the said dwelling-house *at the time when, &c. was and still is the soil and freehold of E. B. Portman, Esq. and that they as his servants and by his command broke and entered the same. The plaintiff replied, admitting the said dwelling-house to be the soil and freehold of E. B. Portman, but stating that one Wm. Green before the said time when, &c. demised the said dwelling-house to the plaintiff as tenant from year to year, by virtue of which the plaintiff entered, &c. and was possessed thereof; and being so possessed, the defendants, as the servants of Green, and by his command, committed the trespass complained of; and traversed that they were the servants of E. B. Portman, and by his command committed the said trespass in manner and form as in the plea mentioned. To this replication there was a demurrer, assigning for special causes, that though the plaintiff has by his replication admitted that the said dwelling-house was the soil and freehold of E. B. Portman as alleged in the plea; yet by his replication he has stated that Green demised the said dwelling-house to the plaintiff to hold as therein mentioned, without shewing any legal title in Green so to do. And also for that the plaintiff by his replication has admitted the said dwelling-house to be the soil and freehold of E. B. Portman, but has not deduced any title from him to Green to enable Green to make the supposed demise to the plaintiff: and also for that the plaintiff has traversed and endeavoured to put in issue an immaterial fact, and no material issue can be taken on the same. In support of these objections,

[*66]

† See Bullen & Leake's Pleadings, p. 417, ed. 1868, from which this head-note has been borrowed. The

case here reported is not cited; but appears to be the primary modern authority for the proposition.—R. C.

CHAMBERS
v.
DONALDSON.

[*67]

Scarlett now argued that the fact of Portman's command alleged in the plea was not traversable, and cited *Trevilian v. Pyne*,† where the distinction was taken between *replevin and trespass *quare clausum fregit*: in the latter it was said that if the defendant justify, and allege freehold in another by whose command he entered, the plaintiff cannot traverse the command, because it would admit the rest of the plea to be true, namely, that the freehold was in that other, and not in the plaintiff; which would be sufficient to bar the action, whether the defendant entered by his command or not. But that it was otherwise in replevin, which was the case in judgment; for there as none but the landlord has a right to enter for the purpose of distraining, the command is important. It is clear that if soil and freehold in another were pleaded in bar and found for the defendant, it would be a good defence to this action; and it is the same thing if the plaintiff, by traversing the command, admits the title in another, and thereby shews that he has no right of action. Trespass being a possessory action, it is sufficient for the plaintiff to declare in the first instance on his actual possession; but if a superior title in another be pleaded, he must then shew title to his possession. If the plaintiff declared that the soil and freehold was in A., and that B. gave him leave to enter and that C., the defendant, entered upon him (the plaintiff) and turned him out; the plaintiff would by his own shewing appear to have no title to maintain the action: but that is the same case with the facts now appearing upon the whole record.

(BAYLEY, J.: Is not actual possession sufficient to maintain the action against a wrong-doer?)

That must be taken in its legal sense; that the law presumes the actual possessor to be the rightful one until the contrary be shewn; but here the contrary is shewn; for when title is admitted in another, which entitles him to the possession, the plaintiff himself appears to be a trespasser, *and therefore

[*68]

† 1 Salk. 107.

cannot maintain the action on his own wrongful possession. CHAMBERS
* * * v.
DONALDSON.

Holroyd, [contrà, cited *Graham v. Peat*.†] [69]

Scarlett, in reply. * * * [73]

LORD ELLENBOROUGH, Ch. J. :

The position which is laid down in *Trevilian v. Pyne*, and which has certainly been the general opinion, that upon a plea to an action of trespass, of *liberum tenementum* in another by whose command the defendant entered, the command is not traversable, comes now for the first time that I am aware of to be questioned in a court of law. That opinion *was indeed delivered extra-judicially, for the case in judgment was in replevin, and the Court decided that the command there was traversable, because the possession of the place where the goods were taken was not the material point, but the right of the party to take the goods ; but certainly in trespass the possession of the place is material. Now, however, that the position comes to be judicially questioned, it is necessary to examine the foundation on which it rests. And unless the command be traversable, it will be sufficient for a mere wrong-doer, who has invaded the quiet possession of the plaintiff, to plead title in another, and an authority from him ; although that other himself did not question the plaintiff's possession. Nay the argument might be pushed further, and it might be contended that the same defence could be set up against a plaintiff who had been in possession for 20 years ; and this monstrous consequence would ensue, that the wrong-doer would protect himself under a title which the party himself could not assert in any possessory action. But since it has been settled in subsequent cases, as in *Graham v. Peat*,† and *Harker v. Birkbeck*,§ that trespass may be maintained by a person in possession against a wrong-doer, we are called upon to strip the wrong-doer of this shield. And unless such a plea can be gotten rid of by traversing the command, this

(†) 6 R. R. 268 (1 East, 244), and
vide *Harker v. Birkbeck*, 3 Burr. 1563.

‡ 6 R. R. 268 (1 East, 244).
§ Burr. 1563.

CHAMBERS
DONALDSON. absurdity will follow, that if title be given in evidence under the general issue, the command may be traversed in evidence, as in *Graham v. Peat* ; when, if the command be pleaded, with title in another, it is not to be traversed. The position, then, standing upon no decided case, but only laid down extra-judicially, and having been contradicted in effect by subsequent decisions with which it is inconsistent, we are *brought back to consider what the rule was before on principles of law and common sense : and if the defendant plead soil and freehold in himself, and the plaintiff cannot shew in reply any right to the possession against him ; that will be sufficient : but if he plead soil and freehold in another, he must also shew that he had the authority of that other, and therefore such authority is traversable.

[*75]

GROSE, J. :

It has always puzzled me to discover any reason why the command might not be traversed as well as the soil and freehold of another in a plea of this description ; for both constitute one defence : and also why it should not be traversed as well upon a special plea as denied under the general issue. There is no other case where the same defence may be made on the general issue and on special plea, that the same answer cannot be given to both. The good sense of the thing clearly is that the command should be traversable in the one case as well as it may be disproved in the other. I could never reconcile the opinion in *Salkeld*, and the practice, which has certainly prevailed in conformity to that, with the rule and practice of law in cases where the same defence was set up under the general issue : and I am glad that the question has at last been judicially raised, that it may be decided according to principles of law and sense.

LE BLANC, J. :

The Court are called upon to determine between two contradictory rules, both of which are said to be rules of law ; one of them is, that on a plea of *liberum tenementum* in another, and that the defendant entered by his command, that *command is not traversable : the other is, that possession is sufficient to maintain trespass *quare clausum fregit* against a wrong-doer.

[*76]

Both these rules cannot stand: for if the latter be true, the plaintiff must be permitted to shew how the defendant is a wrong-doer, by shewing that notwithstanding another may have a better title than the plaintiff, yet that the defendant had no authority from that other to make the entry complained of. If it could have been shewn to be a good plea in trespass, that the freehold was in a third person, without going on to state that the defendant entered by the command of that person, there would have been weight in the argument: but both those facts are always stated in the plea, and are considered to be necessary to constitute the justification; and it would be absurd indeed that several facts should be stated in the plea as necessary to constitute the entire defence, if the plaintiff could not traverse any of those facts which he pleaded. To shew the monstrous consequence of such a doctrine, consider what must be the situation of persons who have been long in undisturbed possession of their houses held under sub-lessees and others, through various mesne assignments, with all which they may be unacquainted: if such possessions, especially in this metropolis, where the ground landlords, whose property is of great extent, are generally well known, were trespassed upon by wrong-doers, who could protect themselves by pleading soil and freehold in the ground landlord, and that they entered by his command; if the fact of such command could not be traversed, and the possessors were obliged to derive title from the ground landlord, all these persons would be precluded from standing upon their possession against mere wrong-doers.

CHAMBERS
v.
DONALDSON.

BAYLEY, J. :

[77]

The question is, whether a mere wrong-doer, when sued for a trespass upon the possession of another, has a right by this mode of pleading to call upon him to set out his title. If the command of the person in whom soil and freehold is pleaded may be traversed, then no other than the person who has the title to the freehold can compel the party in possession to shew his own title to that possession: but if the command be not traversable, then every wrong-doer may call on the party in possession to make that disclosure. Trespass is now understood

CHAMBERS to be a possessory action; but it must cease to be so, if every
 v. wrong-doer could in this manner oblige the party in possession
 DONALDSON. to set out his title.

Judgment for the plaintiff.

1809.
 May 2.

ESDAILE AND OTHERS v. SOWERBY AND MELLER.†

(11 East, 114—117.)

[114]

Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer and of the insolvency of the acceptor, before and at the time when the bill became due; and, within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders, communicated such their knowledge to the bankers in Liverpool, with whom they had before discounted the bill, and who had transmitted it to the holders in London; yet that did not dispense with such holders' giving notice of the dishonour in due time to the indorsers.

ASSUMPSIT by the plaintiffs, as indorsees, against the defendants, as indorsers of a bill of exchange dated the 18th of November, 1807, drawn at three months' date by Cheetham upon Hill for 200*l.*, payable to the defendants' order, and by them indorsed to the plaintiffs, and accepted by Hill, payable at the banking-house of Were, Bruce & Co. in London. Plea, the general issue. At the trial at Guildhall the jury found a verdict for the plaintiff, subject to the opinion of the Court on this case.

Cheetham, the drawer, being resident at Manchester, drew the bill in question upon Hill the acceptor, who was his clerk or agent resident in London for the purpose of selling goods for him, but carried on no business on his own account, nor had he any property of his own. The defendants got the bill discounted by Moss, Dale & Rogers, bankers in Liverpool, who remitted it to the plaintiffs their town bankers, who gave them credit for it in account. The bill was regularly presented for payment at the house of Were, Bruce & Co. on Saturday the 20th of February when it became due, but was dishonoured. *When Cheetham gave the bill to the defendants he owed them above 200*l.* Hill had effects of Cheetham in his hands at that time

[*115]

† Cited by BRETT, J. A. in *Turner v. Samson* (1876) 2 Q. B. D. 23, 25, 46 L. J. Q. B. 167, 35 L. T. 537.

And embodied in B. of E. Act, 1882. See s. 48, s. 50 (2) (a).—B. C.

and afterwards, but not when the bill became due. Cheetham stopped payment on the 24th of January; became bankrupt before the bill was due; and was in the *Gazette* as a bankrupt on the 26th of February. He acquainted the defendants with his situation at the time of his stopping payment, and told them that any paper which became due after that time would not be paid. They also knew that Hill had no funds when the bill in question was running but what Cheetham furnished him with. Cheetham on the 14th of January gave them some other paper to cover outstanding bills, and told them at the same time that the bill in question would not be paid. The other paper which was then delivered to the defendants turned out wholly unproductive. The plaintiffs sent back the bill in question from London by the post on Monday the 22nd of February, but by mistake sent it to the bank at Birmingham instead of to Moss, Dale & Rogers at Liverpool. The bill was returned by the Birmingham bank to the plaintiffs in London on the 25th, when they remitted it by the same post to Moss, Dale & Rogers at Liverpool, where it was received by them upon the 27th, and immediately sent to the defendants, who refused payment. The defendant Meller called on Moss, Dale & Rogers on the morning of the 25th of February, and asked if the bill were returned; and on being told that it was not, Meller said, "Gentlemen, I think it necessary to give you notice that I shall hold the parties responsible for this bill wherever the neglect lies." Moss said, "You know the drawer and acceptor are insolvent, and therefore I beg you will take such steps as if the bill had been returned regularly." *And upon Moss asking if it were possible the bill could have been paid, and expressing his surprise that it had not been returned, Meller answered, "It is impossible the bill can be paid, as both the drawer and acceptor are insolvent, and bills of the same parties have been dishonoured, and therefore it is impossible the bill can be paid." If the bill had been sent back to Moss, Dale & Rogers on Monday the 22nd of February, it would have reached them on Wednesday morning the 24th, twenty-four hours earlier than Meller made the above application. Moss, Dale & Rogers held the plaintiffs to be responsible for the bill to them; the neglect,

ESDAILE
v.
SOWERBY.

[*116]

ESDAILE
v.
SOWERBY.

if any, being in the plaintiffs, and not in the house of Moss & Co. The question for the opinion of the Court was, whether under the above circumstances the plaintiffs were entitled to recover. If so, the verdict was to stand; if not, then a nonsuit was to be entered.

[*117]

Lawes, for the plaintiffs, said that the question meant to be agitated was whether knowledge in the defendants of the insolvency of the drawer and acceptor of the bill, and that it must have been dishonoured at the time when it became due, were equivalent to actual notice given to them of such dishonour by the holders of the bill: but there were several cases† upon the subject in which the want of notice was held fatal; though this, he said, went further than any of them; for not only no prejudice had arisen to the defendants from want of the usual notice; Cheetham the drawer having given them *notice of his insolvency before the bill was due, and the acceptor being known to them to be a mere man of straw; but the defendants had declared their knowledge of all these facts to the plaintiffs' agents at Liverpool on the day after the very earliest intelligence of the actual dishonour of the bill could have reached them by a regular notice, which was only delayed by accident: and this communication he contended was a dispensation of any other notice.

Park, *contra*, was stopped by the Court.

LORD ELLENBOROUGH, Ch. J.:

It is too late now to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour. And as to knowledge of the dishonour by the person to be charged on the bill being equivalent to due notice of it given to him by the holder, the case of *Nicholson v. Gouthit* is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it.

† Vide *Staples v. Okines*, 1 Esp. N. P. Cas. 333. *Nicholson v. Gouthit*, 3 R. R. 527 (2 H. Blac. 610), *Whitfield v. Savage*, 2 Bos. & P. 277, and *Clegg v. Cotton*, 3 Bos. & P. 239. And see *Russel v. Langstaffe*, Dougl. 515, and *Warrington v. Furber*, 8 East, 245.

LE BLANC, J. :

ESDAILE
v.
SOWERBY.

Lord Chief Justice EYRE was much disposed in that case to have dispensed with the notice, but found himself precluded by the authorities.

BAYLEY, J. :

It was said in *Tindal v. Brown*† that notice means something more than knowledge ; because it was competent to the holder to give credit to the maker, &c.

Per CURIAM :

Postea to the defendants.

HALL v. ODBER.

(11 East, 118—127.)

1803.
May 2.

[118]

The effect of a foreign judgment in this country is not to merge the original cause of action. The foreign judgment is evidence of the debt ; but it is open to the parties to enquire into the regularity of the judgment.‡

THE plaintiff declared in Hilary Term, 1808, upon a judgment obtained by him against the defendant, in the Court of King's Bench at Quebec in Lower Canada, in February, 1807, for 8,096*l.* 15*s.* 8½*d.* with interest at 5*l.* per cent. from the 31st of October, 1805. There were also counts for goods sold and delivered, for interest, for money lent, paid, had and received, and on an account stated. The defendant pleaded the general issue ; and at the trial before Lord Ellenborough, Ch. J. at Guildhall after last Trinity Term a verdict was found for the plaintiff for 9,193*l.* 12*s.* 8½*d.*, subject to the opinion of the Court on the following case.

The plaintiff, a merchant in London, and the defendant a merchant in Canada, had had various dealings together, and about the middle of 1806 the plaintiff brought an action against the defendant in the Court of King's Bench at Quebec for

† 1 E. R. 171 (1 T. R. 169).

(1851) 16 Q. B. 177, 20 L. J. Q. B.

‡ Of the more recent cases confirming this view, it may be sufficient to cite *Bank of Australasia v. Nial*284 ; *Schilsky v. Westenholz* (1870) L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. 93.—R. C.

HALL
v.
ODDER.

[*119]

8,096*l.* 15*s.* 8½*d.*, to which the defendant pleaded the general issue; and a cross cause, called in that Court an incidental cause, was instituted there by the defendant for money alleged to be due to him. The following judgment was proved in evidence on the part of the plaintiff, entitled, "Province of Lower Canada, district of Quebec. King's Bench, Superior Term, Friday, 20th February, 1807, C. C. Hall, plaintiff *v.* T. T. Odber defendant, and *vice versa*. The Court having duly examined and considered the pleading, proofs, &c. as well in the cause in chief, as in the incidental cause, &c.; it is considered and adjudged that the said C. C. Hall do recover from the said T. T. Odber 8,096*l.* *15*s.* 8½*d.* sterling, with interest thereon at five per cent. from the 31st of October, 1805, until perfect payment and costs to be taxed: but execution is hereby stayed until the further order of the Court. And the Court declares that this judgment so pronounced for the plaintiff in this cause in chief shall be hereafter defeasanced and reduced by a deduction of such sum as the said Court shall adjudge to the said incidental plaintiff upon the final hearing of the said incidental cause; reserving to the said C. C. Hall such recourse for the residue of his demand as he may legally have, &c. And it is further considered by this Court, that it be permitted to the said incidental plaintiff to sue out with all due diligence a commission for the examination of the incidental defendant, and such necessary witnesses on the part of the said incidental plaintiff as may be resident in Great Britain, or elsewhere without this Province, upon interrogatories and cross interrogatories to be duly filed, &c. And in order that the said incidental plaintiff may have a reasonable time allowed him to prove his demand, the Court doth grant six calendar months from the date of this judgment for the return of such commission. And the Court doth reserve its judgment, and all further directions upon the exceptions or demurrer filed by the incidental defendant in the said incidental cause, until the final hearing of such cause." The defendant having arrived in England, the plaintiff on the 3rd of July, 1807, sued out a bailable writ against him for 5,000*l.*; upon which the defendant was arrested on the 8th of July, 1807, and committed to the King's Bench prison on the 24th of the same month, being within

the six calendar months from the day of the before-mentioned judgment at Quebec ; no notice of any commission or proceeding *in the incidental cause having then or since been given by either party. The plaintiff also gave in evidence an account current between him and the defendant, signed by the defendant, commencing with a balance to the defendant's debt as due to the plaintiff on a former account up to the 1st of January, 1805, of 14,664*l.* 16*s.* 2*d.* ; and after various items on each side of such account, concluding with a balance due to the plaintiff on the 31st of October in the same year of 8,096*l.* 15*s.* 8½*d.* And no other evidence was given at the trial. The question for the opinion of the Court was, whether the plaintiff were entitled to recover either on the before-mentioned judgment, or on the other evidence, notwithstanding such judgment had been adduced in proof. If he were, the verdict was to stand : if otherwise, a nonsuit was to be entered.

HALL
v.
ODDER.

[*120]

[After argument:]

LORD ELLENBOROUGH, Ch. J. :

[123]

There are two counts in the declaration ; the one upon a foreign judgment, which is said to be suspended ; the other upon an account stated. The judgment is for a sum certain found to be due from the defendant to the plaintiff, with interest thereon from a certain day past ; but with a stay of execution till the further order of the Court : and this at first struck me as an incomplete judgment, on which no action could be maintained *here. But we have been pressed with the course of proceedings in our own courts, where upon judgment recovered and a stay of execution upon the allowance of a writ of error, an action lies nevertheless upon such judgment in the mean time ; and applications are continually made to the equitable jurisdiction of the Court to stay proceedings in such actions pending the writ of error.† No application of that sort was attempted to be made in the present instance, in analogy to such practice of the Court in common cases. Can we then say that, taking this to be a final judgment, the plaintiff is not entitled to his

[*124]

† *Vide* 1 Tidd, ch. 20. [W. Tidd, Practice of the Courts of King's Bench and Common Pleas.]

HALL
r.
ODDER.

action on the judgment, notwithstanding a stay of execution? But supposing this not to be considered as a final judgment, it would not stay the plaintiff's action on the simple contract upon the account stated, and still the plaintiff would be entitled to recover upon the evidence on the account stated. In either view, strictly speaking, judgments in foreign courts are not to be considered upon the same footing as judgments in our own courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but *assumpsit* lies on them, and it is open to the parties to enter into the question of their regularity; as in the instance mentioned. If then the plaintiff's demand did not pass *in rem judicatam*, so as to become matter of record, and no objection can be made on that ground to the form of this action of *assumpsit*, the judgment was clearly evidence of his demand. And on the other ground, *assumpsit* lies to recover a liquidated balance. But then it is objected that there was a stay of execution for six months, and that the plaintiff could not sue for his demand before: but that time was gone by long before the *filing of his declaration in this action; and if we were to advert to the purpose for which the stay of execution was granted, it appears that the time had elapsed without any step taken by the defendant to sustain his counter demand: and if there had been any equitable ground for staying proceedings in this action, he ought to have applied to this Court. Therefore neither on legal, nor on equitable grounds is there any objection to this action, either on the ground of the foreign judgment or on the account stated.

[*125]

GROSE, J. :

It is stated that the plaintiff gave in evidence an account current between him and the defendant, signed by the defendant, in which he acknowledged the balance due to the plaintiff which he has recovered: that is decisive to shew an account stated between them, and a certain sum due to the plaintiff: and there is nothing to shake this evidence; for a foreign judgment is only evidence of the debt due; and taking that judgment in every possible way, no objection can be raised upon it to the plaintiff's recovery in this action.

LE BLANC, J. :

HALL
r.
ODDER.

It was long ago determined that a judgment in a foreign court has only the force of a simple contract between the parties : it is evidence of the debt. This judgment therefore only went to shew what demand the plaintiff had against the defendant, and it ascertains the amount : but then it goes on to stay execution for a certain time, in order to enable the defendant to establish a cross demand if he had any : and that distinguishes this from the former case of *Sadler v. Robins* ; † for there the defendant's costs were first to be taxed, and deducted from the sum which had been found due to the plaintiff upon *his original demand : something therefore was clearly due to the defendant ; and that was first to be ascertained before the plaintiff was entitled to the fruits of his judgment ; and till that was done his demand was not ascertained. But here the sum due to the plaintiff is ascertained by the judgment, and that is evidence of the debt due to him : and then *assumpsit* may well be brought to recover it, as it is clear that a foreign judgment is no merger of a simple contract debt. But this, it may be said, is evidence of the debt, with a stay of execution for a certain time. If however the defendant had had any real cross demand to establish which the bringing of this action prevented him from doing, he should have applied to this Court to stay the proceedings upon the ground that the Court abroad had reserved to him a certain time for that purpose ; and if he had shewn any merits, the Court would have staid the proceedings in order to give him the fair benefit of that reservation : but no ground of that sort was laid before the Court ; and therefore no answer has been given to the plaintiff's demand.

[*126]

BAYLEY, J. :

The plaintiff proved a settled account here between him and the defendant, by which the latter acknowledged to be indebted to him so much on the balance. He also proved a judgment recovered in a foreign Court for this sum against the defendant : that was a confirmation of the account settled. But it appeared that the defendant in that suit had made a counter

† 1 Camp. N. P. 253.

HALL
v.
ODDER.

[*127]

demand; and the Court there suspended the execution of the judgment given for the plaintiff for a certain time to give the defendant an opportunity of establishing, if he could, his cross demand. But this being only a foreign judgment did not extinguish or merge the plaintiff's simple contract *debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt; and no answer has been given to it on the part of the defendant.

Postea to the plaintiff.

1809.
May 3.

[132]

THE KING v. THE INHABITANTS OF KEA.

(11 East, 132—134.)

A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness; and therefore an order of Sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed.†

UPON an appeal to the Sessions from an order of two justices, removing Thomas Pope, son of Mary Davey, now the wife of James Davey, by her former husband M. Pope, deceased, aged 7 years and 6 months, from the parish of Kea to St. Eval, both in the county of Cornwall; it appeared that Martin Pope married Mary Davey in 1798, who during such their marriage was delivered of the pauper in the parish of Kenwyn in the said county. That Martin Pope was, at the time of the birth of the pauper, and up to the time of his own death, in 1806, legally settled in St. Eval. That the pauper, being of the age of 7 years and upwards, had not gained any settlement in his own right. That on the 6th of January, 1800, a marriage in fact took place between Mary Davey (by her maiden name of Hitchens) and James Davey, and at the time of the conception of the pauper, they were living together in Kenwyn as man and

† Compare *In re Rideout's trusts* (1869-70) L. R. 10 Eq. 41; *Re Yearwood's trusts* (1877), 5 Ch. D. 545, 46 L. J. Ch. 478. But see, as confirming the principle of *R. v. Kea, Guardians of Nottingham v. Tomkinson* (1879) 4 C. P. D. 343, 48 L. J. M. C. 171:

Burnaby v. Baillie (1889) 42 Ch. D. 282, 58 L. J. Ch. 842, 61 L. T. 634. And the principle is acknowledged, and not controverted, by the judgments of the Committee of Privileges in the *Aylesford Peerage case* (1885) 11 App. Cas. 1.—R. C.

wife; and that Mary Davey was remarried to James Davey in the beginning of the present year. And after other witnesses had been examined for the purpose of proving that Martin Pope had not had access to Mary Davey at the time of the conception of the pauper, nor for many months before; and after Mary Davey (objection having been first made to her competence to prove this fact, and over-ruled,) was examined, and it appeared from her evidence that Martin Pope had not access to her during the period aforesaid; the sessions, as well on the testimony of the said other witnesses as to the non-access of Martin Pope, as on the evidence so given by Mary Davey as *aforesaid, and not exclusively on either, reversed the order of removal, subject to the opinion of this Court on the question, Whether the evidence of Mary Davey, in proof of such non-access of the said Martin Pope, her late husband, ought to have been received?

THE KING
v.
THE INHABI-
TANTS OF
KEA.

[*133]

Lord ELLENBOROUGH, Ch. J., when this case was called on, said that to hold this evidence receivable would be in direct contradiction to *The King v. Reading*,† and other cases; ‡ which were not meant to be over-ruled in *The King v. Luffe*: § the Court in that case intending that the wife had been examined only to those facts which she might legally prove, and not to the non-access of the husband; the principle of public policy precluding her from being a witness to that fact. And the rest of the Court signifying their concurrence in this opinion;

Burrough and *Casberd*, who were to have supported the order of Sessions, said that this case was distinguishable from others, because the husband was dead at the time when the wife was examined; and therefore if the rule had stood merely on the ground that the giving of such testimony was calculated to promote dissention between husband and wife, it would have ceased to apply in this instance, where one of the parties was dead: but if the Court considered that the rule stood on the broad ground of general public policy, affecting the children born during the marriage as well as the parties themselves, they could not pretend to argue in support of the order.

† Cas. temp. Hard. 79.

King v. Luffe.

‡ These are all collected in *The* § 9 R. E. 406 (8 East, 193).

THE KING
v.
THE INHABI-
TANTS OF
KEA.

[134]

THE COURT unanimously assented to this. And LE BLANC, J. added, that they were bound on the statement of this case to notice the objection taken to the competency of the wife to prove the fact of non-access; for the Sessions, after hearing her evidence to that point, had declared that they found the fact as well on her evidence as on the testimony of the other witnesses, and not exclusively on either. And this ought to be noticed as an ingredient in the decision of the Court.

The *Attorney-General* and *Dampier* were to have argued against the order.

Order of Sessions quashed.

1809.
May 25.

[142]

BOYDELL v. DRUMMOND.

(11 East, 142—160.)

If it appear to have been the understanding of the parties to a contract at the time that it was not to be completed within a year, though it might and was in fact in part performed within that time, it is within the 4th clause of the Statute of Frauds, 29 Car. II. c. 3.; and if not in writing, signed by the party to be charged, &c. it cannot be enforced against him. And his signature in a book intituled "Shakespeare subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence.†

THE declaration stated that the plaintiff and his deceased partner (the late Mr. Alderman Boydell) had proposed to publish by subscription a series of large prints from some of the scenes in Shakespeare's plays, after pictures to be painted for that purpose, under certain conditions, viz. 72 scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing 4 large prints, at the price of 3 guineas a number, 2 of which were to be paid at the time of subscribing, and the remaining guinea on the delivery of each

† But *quære* whether there was not as much to constitute a signed contract as would have brought the case within the principles of *Ridgway v. Wharton* (1857) 6 H. L. C. 238,

257, 24 L. J. Ch. 46, *Long v. Millar* (C. A. 1878) 4 C. P. D. 450, 48 L. J. C. P. 596, 41 L. T. 306, or *Shardlow v. Cotterell* (C. A. 1881) 20 Ch. D. 90, 51 L. J. Ch. 353, 45 L. T. 572.—R. C.

successive number; and on the delivery of each number 2 guineas were to be advanced by the subscribers towards the succeeding number; and that one number at least should be annually published after the delivery of the first. And then the declaration stated that on the 7th of April, 1790, the defendant became *a subscriber for one set of prints, and paid his 2 guineas; and that in consideration that the plaintiff and his late partner had promised to perform the conditions on their part as such publishers, the defendant promised to perform the conditions on his part as such subscriber: and then it alleged that although the publishers had performed and were ready to perform the conditions and promises on their part in all respects, and although one set of the prints had been long since published and ready for delivery to the defendant, according to the form and effect of the said conditions, of which he had notice on the 10th of December, 1804; and though the defendant was duly requested to accept the said prints and to pay for the same according to the said conditions and his promise, and he did accept two numbers, and paid the plaintiff a further sum of 3 guineas on the delivery of each of those numbers, according to the said conditions; yet he refused when so requested to accept the residue of the prints or pay for the same. There were other counts laying the contract more generally, and the common money counts. To all which the defendant pleaded non-assumpsit, and that the cause of action did not accrue within six years.

BOYDELL
v.
DRUMMOND.

[*143]

It appeared at the trial that the first prospectus of the work was published in 1786, and a second prospectus in 1787. On the first of May, 1789, the Shakespeare gallery was opened in Pall-Mall, with an exhibition of 34 large pictures then finished, and in March, 1790, an additional number were exhibited, amounting in all to 56: and also specimens of several of the prints in a state nearly ready for publication. In April, 1790, the defendant became a subscriber to the large prints; (a splendid edition of the letter-press of the plays, and a series of small *prints to bind up with it, forming a distinct part of the proposed plan of publication.) The defendant's subscription was No. 1103, the whole number of subscribers at the close having been 1384. At the time of his subscription the defendant paid

[*144]

BOYDELL his two guineas in advance, and had a receipt given him for the
 v. same. The delivery of the first number was made in June,
 DRUMMOND. 1791,† when it was delivered to the defendant's order, who
 thereupon paid the third guinea and two more in advance for
 the next number. The second number was delivered to the
 defendant on the 29th of March, 1792, was advertised as before,
 and the defendant also sent for that, and paid his 3 guineas, two
 of them in advance for the 3rd number as before. These
 numbers were delivered out at the gallery in Pall-Mall, being the
 place where the defendant had subscribed. Others were delivered
 out to other subscribers at Messrs. Boydell's shop in the city.
 After this time at least one number was delivered to the sub-
 scribers in general in every year, sometimes two, and in two
 instances three within a year, until the whole were completed;
 but the defendant never sent for any more of the numbers,
 though he never gave notice of his intention to discontinue
 taking them in. Nor did the plaintiff ever make any particular
 [*145] demand on the defendant to take *the remaining numbers and
 pay for them till 1807, after the whole work was completed and
 published; but the rest of the numbers as they came out were
 regularly laid by for him according to the order of time of his
 subscription. The last number was published in 1808, and the
 number of prints finally delivered to the subscribers who sent
 for them was 12 more than the stipulated number. This was
 the general nature of the case and of the evidence, which
 branched out into several questions; but as the judgment of the
 Court ultimately turned solely on the application of the Statute
 of Frauds to this case, it is only necessary to state the evidence
 with particularity as to that point.

The first prospectus of the work, in December, 1786, stated

† It was offered to be proved at the trial that the delivery of the numbers was advertised in some of the public newspapers to give notice to the subscribers, that they might send for them: but Lord ELLENBOROUGH, Ch. J. would not receive the evidence, unless it were also shewn that the defendant was in the habit of taking in one of such news-

papers; which the plaintiff was not prepared to prove: this part of the cause therefore rested on the fact of the delivery of the two first numbers to the defendant's order; but the point was ultimately saved with the rest: and when it was mentioned again in Court, his Lordship still thought the evidence of notice deficient for the reason before stated.

the intention of Messrs. Boydell "to publish by subscription, (as an accompaniment to the letter-press,) a series of large prints, after pictures to be immediately painted," by certain artists named, from the most striking scenes of Shakespeare. And that as soon as the pictures were engraved, they would be hung up in the Shakespeare gallery. It then stated certain conditions in substance the same as those set out in the declaration, together with others calculated to shew the magnitude and difficulty of the undertaking, the great number of artists necessary to be engaged in its performance, and that the completion of it would unavoidably take a considerable time. The expense of it was therein estimated at above 50,000*l*.† and it was "hoped that the public would be forward in their subscriptions, and thereby incite the various artists engaged in the present arduous design to exert their utmost abilities in the execution of it." One *of the conditions was, "that one number at least should be published annually; and the proprietors were confident they should be enabled to produce two numbers within the course of every year." The other prospectus, published in January, 1807, gave an account of the progress of the work so far as it was then published, and of the preparations for its continuance, with observations on the means employed and the delays and difficulties which might occur in its execution. Printed copies of the two prospectus were lying about the shop for public inspection at the time of the defendant's subscription, and the general practice was to deliver them to subscribers at the time of their subscription. But the book in which he subscribed his name had only for its title "Shakespeare Subscribers, their signatures," without any reference to either prospectus in the terms of it. After the whole work was completed and published, an application was made to the defendant in August, 1806, and again in March, 1807, to take and pay for the remaining numbers of his subscription; to which latter he returned an answer in writing, dated 1st of April, 1807, in which he stated that he ceased taking in the numbers of the Boydell Shakespeare many years ago, in consequence of the engagement not

BOYDELL
f.
DRUMMOND.

[*146]

† The work was afterwards stated to have cost considerably above 100,000*l*.

BOYDELL
v.
DRUMMOND.

being fulfilled on the part of the proprietors; and not having been applied to from that time till very lately, he did not consider himself called upon to complete the set. (Signed by the defendant.) The receipt for the defendant's subscription was in this form: "Received from J. Drummond, Esq. one guinea as the second subscription to the first number of the Shakespeare with large plates; and at the same time received two guineas as the first subscription to the second number, agreeably to the original proposals." (Signed for the plaintiffs.)

[147]

Several objections were taken to the action; [*inter alia* and] 2ndly, That it was not a contract to be performed within a year, and was therefore void within the Statute of Frauds, 29 Car. II. c. 3, s. 4, the whole contract not having been reduced to writing, and signed by the parties, &c. * * *

[148]

Park, Holroyd, and Dampier shewed cause against a rule for setting aside the nonsuit. * * * 2ndly, It was morally certain from the subject matter of this agreement that it could not be executed within a year, and it provided in the very terms of it for the annual performance of certain portions of the work: it is therefore void by the Statute of Frauds for want of being reduced to writing and signed by the parties. It was indeed proved that the defendant had subscribed his name in a book with the title of "Shakespeare Subscribers, their signatures," and that printed copies of the prospectus were lying about the shop, one of which it was the general practice to deliver to each subscriber at the time of his subscription; but there was nothing to connect the prospectus with the signature in the book except by parol testimony; and it was the very object of this branch of the statute to exclude the intervention of parol testimony where parties were to be bound by contracts that were not to be completely performed within a year. No copy of the prospectus was ever affixed to the book.† Where a parol contract is to be performed at an indefinite period, it lies on the party insisting on performance of it to shew at least that it might have been performed within the year.

† On this head, the defendant's counsel afterwards referred, at the conclusion of the argument, to *Hinde*

v. *Whitehouse*, 8 R. R. 676 (7 East, 558).

(LE BLANC, J. : Supposing all the prints could have been completed within a year, would the subscribers have been compellable to take and pay for them within that time under the terms of the agreement ?

BOYDELL
v.
DRUMMOND.

Lord ELLENBOROUGH, Ch. J. : Was it in the contemplation of the subscribers to be called upon to make so large a payment, as the whole would have amounted to, within so short a *period ?

[*149]

It seems not within the fair meaning of such an agreement, one object of which is to diminish the pressure of the expense by dividing it into moderate annual instalments. * * *

On the numbers being published if the plaintiff meant to enforce the contract, he ought to have made an actual tender of them to the defendant, according to *Calomel v. Briggs*,† unless discharged by the latter saying that he would not receive or pay for them if sent: and this ought to have been done within a reasonable time after each publication; otherwise it shews that the contract was meant to be abandoned: and if once abandoned as to any prior number, the defendant could not be compelled to take the subsequent numbers, the value of which would be materially diminished by the chasm in the set; and no person can be bound to take part only of a work. * * *

[150]

The *Attorney-General*, *Garrow*, *Marryat*, and *Bolland*, in support of the rule :

* * The 2nd., they said, was a new and important question. It is not necessary, in order to take an executory contract out of the 4th section of the Statute of Frauds, to make it appear by the terms of the contract that it must be executed within a year: on the contrary it was said by DENNISON, J. in *Fenton v. Emblers*,‡ that the statute plainly meant an agreement not to be performed within a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon contingency. It does not extend to cases where

[151]

† 1 Salk. 112.

‡ 3 Burr. 1281 and 1 Blac. Rep. 353.

BOYDELL
v.
DRUMMOND.
[*152]

the thing only may not be performed *within a year; and the Act cannot be extended further than the words of it. And with this agrees *Smith v. Westhall*.† It is sufficient that it may be; and if the question depended upon the possibility or impossibility of performance within the year, the jury must decide upon it. Before the defendant subscribed, the Shakespeare gallery had been opened with an exhibition of 56 pictures, with specimens of several of the prints nearly ready for publication; and in fact the first number was published in little more than a twelvemonth after his subscription. Then when the defendant accepted the first number, he entered into a new contract for the second and subsequent numbers, and he confirmed that contract by the acceptance of the second. Such acceptance, therefore, took the case out of the statute, by the partial execution of the contract. If this were otherwise, one who contracted with another for the building of a house, if not in writing, would be absolved from his contract, unless the house were to be finished within a year. Suppose goods sold and delivered for a certain price, at 13 months credit, without writing; the terms of payment would be a part of the contract, and if no evidence could be given of that by the statute, the vendor would not be bound by the stipulated price, and the jury could only give a verdict for the value of the goods.

(Lord ELLENBOROUGH: In that case the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of consideration only would be reserved to a future period.)

[*153] The policy of the statute does not apply to contracts which are to be in part executed, though not completed, *within the year; because a partial execution of itself furnishes evidence of the reality of the contract; and the danger meant to be guarded against was the setting up, by perjured testimony, of supposed contracts, which were not evidenced by any acts of the parties

† 3 Salk. 9, and 1 Ld. Ray. 316. lected in Roberts on the Statute of Frauds.
All the cases were stated to be col-

BOYDELL
v.
DRUMMOND.

within a year; which period was taken as the limit of reasonable time, within which it was probable that the execution of a mere parol contract, not evidenced by any acts of the parties, would be postponed, and which was therefore required to be evidenced by writing. And as a delivery of part of the goods at the time, by way of earnest to bind the bargain, will take a case out of the statute, so will part-performance within the year, which is analogous to earnest. But supposing it to be necessary to prove the contract by writing, signed, &c. they contended that there was such evidence of it in this case: for the terms of the contract were stated in the printed prospectus, to which there was sufficient reference by the title of the book in which the subscribers' names were entered, viz. "Shakespeare Subscribers, their Signatures."

(Lord ELLENBOROUGH, Ch. J.: The prospectus cannot be connected with the book of subscriptions without parol testimony. What is there in the title to refer to the particular prospectus rather than to any other? If it had referred to the particular prospectus then published, it would have helped the plaintiff over the difficulty.)

It is not pretended that there was any other prospectus to which it could refer; and the defendant's letter recognizes this engagement with the proprietors of the Boydell Shakespeare; and no other engagement than that contained in the prospectus was shewn. On this head they cited *Welford v. Beazely*,† and *Tawney v. Crowther*.‡ * * *

LORD ELLENBOROUGH, Ch. J.:

[133]

On conference with my brothers, finding that we are all of opinion that the action is not maintainable on one of the grounds of objection taken to it, it is not necessary to discuss the others. We are all clearly of opinion that this was not a contract which was to be performed within a year, and ought therefore to have been evidenced by writing signed, as required by the Statute of Frauds. The whole scope of the undertaking

† 3 Atk. 503.

‡ 3 Br. C. C. 161, and *ib.* 319.

BOYDELL
v.
DRUMMOND.

[*156]

shews that it was not to be performed within a year : and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued that an inchoate performance within a year is sufficient to take the case *out of the statute; but the word used in the clause of the statute is "performed," which *ex vi termini* must mean the complete performance or consummation of the work: and that is confirmed by another part of the statute, requiring only part-performance of an agreement to supersede the necessity of reducing it to writing; which shews that when the Legislature used the word "performed," they meant a complete and not a partial performance. If this were not the true construction of the statute, great inconvenience would ensue in the execution of contracts for large works, which must necessarily require a long time for their completion; as in the instance of Somerset House, which occupied many years in the building. If one stone were laid within a year from the making of the contract by parol, it would, according to the argument, have taken the case out of the statute, leaving the terms on which the great mass of it was to be built to fallacious memory alone, to be exercised at some distant period; which would let in the very mischief which the statute meant to guard against. Therefore to exclude perjury, and to perpetuate the true terms of contracts which were not to be performed within a year, there is no doubt that the statute meant a consummate performance within that time. Now here by the very terms of the contract, and clearly in the contemplation of the parties from the whole scope of it, it was not to be performed within a year; for the agreement was to publish at least one number annually after the delivery of the first, and according to the number of pictures to be published, at the rate of two from each play, the work would consist of many numbers. On this ground the case appears to be clearly within the statute, and the objection taken to the action to be well founded.

[*157]

Without considering therefore the question as *to the stamp, though I have not much doubt on that or on other questions

which have been raised, it is sufficient to say that the nonsuit ought to stand. I should add, that I cannot connect the subscription of the plaintiff's name in the book with the prospectus; nor does the defendant's letter refer to the prospectus produced at the trial. It speaks indeed of his engagement with the proprietors of the *Boydell Shakespeare*; but it cannot be shewn to be the engagement contained in the particular prospectus without parol evidence, which the statute excludes. If there had been a plain reference to the particular prospectus, that might have helped the plaintiff; but there is nothing of that kind.

BOYDELL
v.
DRUMMOND.

GROSE, J.:

Considering the nature of the work, and the whole of the two prospectus, it is impossible to say that the parties contemplated that the work was to be performed within a year; for it was to be published annually in numbers, and it was clear that it would take many years to complete it. This therefore is one of those cases which the Statute of Frauds contemplated, and in which it is eminently useful and necessary: and it is clear that the contract ought to have been in writing.

LE BLANC, J.:

Looking at the two prospectus, it appears by the very terms of the contract, as it is to be collected from them, that it was to be performed at a period beyond the space of one year; for the publishers considered it possible that two numbers might be produced in every year, but not more; and at that rate it would necessarily require many years to complete the work. And if it had been possible to complete the whole in one year, few subscribers would have been found who *would have engaged to pay the whole money within that time. The contract therefore, not being contemplated to be performed within a year, is required by the Statute of Frauds to be in writing and signed by or on behalf of the party to be charged. Then can we say that this was in writing and so signed? The evidence is, that the defendant subscribed a book entitled, "*Shakespeare subscribers, their signatures.*" If there had been any thing in that book which

[*158]

BOYDELL
v.
DRUMMOND.

had referred to the particular prospectus, that would have been sufficient: if the title to the book had been the same with that of the prospectus, it might perhaps have done: but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus, exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds. And then the only question is, whether the case can be taken out of the statute, because there was a part performance of the contract within the year: but no case goes the length of deciding that; and such a construction would leave the whole mischief intended to be remedied by the Act still subsisting. For such part performance does not shew that it was the particular prospectus produced at the trial which the defendant's signature referred to; and if that can only be established by parol evidence, which is necessary to connect the signature with the two papers, it still leaves the case within the mischief meant to be provided against. I am sorry therefore for the justice of the case, that the objection, which goes on a ground beside the merits of the question, must prevail.

[159] BAYLEY, J. :

It was clearly the understanding of all parties that the contract was not to be performed within a year: and if the publishers could by possibility have completed the work within that time, they could not have compelled the defendant to have taken and paid for it immediately. I use the word completed, because I think that it is the true meaning of the word performed used in the statute. The cases have decided that in order to bring a contract within this branch of the statute, it must either have been expressly stipulated, or it must appear to have been the understanding of the parties, that it was not to be performed within a year. That does appear in the present case; and I cannot say that a contract is performed, when a great part of it remains unperformed within the year; or in other words, that part performance is performance. The mischief meant to be prevented by the statute, was the leaving to memory the terms

of a contract for longer time than a year. The persons might die who were to prove it; or they might lose their faithful recollection of the terms of it. If part performance were to supply the want of writing, a party might be fixed with a contract for supplying goods for 20 years together, at the price which was paid for them in the first year, although the price might have risen considerably; for it would be said that the price paid for those delivered immediately was evidence of the rate agreed upon for the delivery in subsequent years. But here it is argued that the book of signatures may be connected with the two prospectus which were published at the time and delivered to the subscribers: but that cannot be done without the intervention of parol evidence, and that opens a door to perjury, which it was the object of the statute to prevent. Besides, it would still be left uncertain upon *the face of the papers to what the defendant's subscription applied; for there were subscribers to the whole work, and subscribers to the prints only; and it would not appear to which of these the defendant's signature was meant to apply.

BOYDELL
v.
DRUMMOND.

[*160]

Rule discharged.

1809.
May 5.

GASKELL v. KING.

(11 East, 165—167.)

[165]

A distinct covenant in a lease, whereby the tenant bound himself to pay the property-tax and all other taxes imposed on the premises or on the landlord in respect thereof, though void and illegal by the stat. 46 Geo. III. c. 65, s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray.†

THE plaintiff declared in covenant upon an indenture of the 2nd of March, 1807, whereby he demised to the defendant a messuage for 12 years, at a certain rent, payable quarterly, clear of all and all manner of parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever. And the defendant covenanted to pay to the plaintiff the said rent in manner the same as is therein before made payable. The plaintiff then alleged a breach of the covenant by the non-payment of 26*l.* 5*s.* for a quarter's rent, due on the 25th December, 1808. The defendant cravedoyer of the indenture, in which the covenants were stated in the manner and order before mentioned; and then followed immediately after the words, in manner the same as is hereinbefore made payable, these words: "And also shall well and truly pay the land-tax, property-tax, and all and all manner of other taxes, &c. whatsoever, parliamentary, parochial, or otherwise however, which now are, or which shall at any time during the continuance of the said term hereby demised be rated, taxed, assessed, or imposed on the said demised premises or any part thereof, or on the said plaintiff, his executors, &c. on account thereof, and save harmless and indemnified the plaintiff therefrom, and from all costs and charges which

† Cited by WILLES, J., in *Pickering v. Ilfracombe Ry. Co.* (1868) L. R. 3 C. P. 235, 250, 37 L. J. C. P. 118, 16 L. T. 650. "The general rule," he says, "is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the com-

mon law, you may reject the bad point and retain the good." This ruling is again followed in the judgment of the COURT OF APPEAL in *In re Burdett, Ex parte Byrne* (1888) 20 Q. B. D. 310, 314, 57 L. J. Q. B. 263, 58 L. T. 708, and by CHITTY, J., in *Baker v. Hedgecock* (1888) 39 Ch. D. 520, 522, 57 L. J. Ch. 889, 59 L. T. 361.—R. C.

may happen on account thereof." And then it set out a covenant by the defendant to keep the premises in repair, and other covenants, amongst others, a covenant for re-entry of the plaintiff in case of the breach of any of the covenants by the defendant, including the non-payment *by the defendant of the property-tax and other taxes covenanted to be paid by him; concluding with a covenant by the plaintiff, that the defendant, paying the said yearly rent thereby reserved in manner aforesaid, and performing his covenants aforesaid, shall quietly enjoy the premises during the term. And then the defendant demurred generally. And the question was, Whether the covenant for payment by the lessee of the property-tax rendered the whole lease void by the Act of the 46 Geo. III. c. 65, s. 115, and 195, which avoids such a covenant?†

GASKELL
v.
KING.

[*166]

Lawes, for the defendant, contended in the affirmative. The covenant in question is interwoven in effect with the covenant for payment of the rent, and is in fraud and against the policy of the law. If the tenant had paid the *property-tax upon this covenant, he could not have recovered back the money from the landlord.

[*167]

† 46 Geo. III. c. 65.—By sect. 115,† If any person shall refuse to allow any deduction authorized to be made by this Act out of any rent or other annual payment mentioned in the 9th and 10th rules of No. 4 schedule (A), or out of any annuity or annual payment mentioned in schedule (C) or (E), or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of 50*l.*; and all contracts, covenants, and agreements, made or entered into, or to be made or entered into for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void.

Sect. 195. Provided that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes or assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon as aforesaid, nor to be binding contrary to the intent and meaning of this Act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements.

† The clause in the modern Act (5 & 6 Vict. c. 35, sect. 103), is in similar terms.—R. C.

GASKELL LORD ELLENBOROUGH, Ch. J. :

r.
KING.

The covenant by the lessee for payment of the property-tax, and for indemnifying the landlord from it, is void by the statute ; but that will not avoid other independent covenants in the lease which are good, such as that for payment of rent. The covenants are entirely distinct.

LE BLANC, J. :

If the subsequent covenant for payment of the property-tax had not been inserted in the lease, it could not have been pretended that the lease would be void because it reserved the rent clear of all parliamentary taxes ; for that must be understood of taxes which the tenant might lawfully covenant to pay in exoneration of his landlord.

BAYLEY, J. :

In the construction of the general words stipulating for the payment by the tenant of all parliamentary taxes, the law would imply an exception of such taxes as could not legally be defrayed by him : and the subsequent illegal covenant by the tenant for indemnifying his landlord from the payment of the property-tax will not avoid the former general and good covenant for the payment of rent clear of all parliamentary taxes, &c. : and if the tenant had paid the property-tax for his landlord, he might, notwithstanding such covenants, have produced the collector's receipt to the landlord in discharge of so much of the rent.

Per CURIAM :

Judgment for the plaintiff.

JOHNSON AND OTHERS *v.* HUDSON.

(11 East, 180—183.)

1809.
May 6.

[180]

A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at Guernsey, of which a regular entry was made on importation, but without having entered himself with the excise office as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a dealer in tobacco within the meaning of the stat. 29 Geo. III. c. 68, s. 70, which requires every person who shall deal in tobacco first to take out a licence under a penalty.

THIS was an action to recover 60*l.* 7*s.*, the value of 21 lbs. of tobacco-segars, sold and delivered by the plaintiff to the defendant in November, 1806. The tobacco appeared to be partly manufactured; and the *principal question made at the trial, at Guildhall, was, Whether the plaintiffs, who had never before dealt in tobacco, but had had the tobacco in question, parcel of a larger quantity, consigned to them from Guernsey, to be disposed of, and who had made a regular entry of it on importation, but had not entered themselves with the excise office as dealers in tobacco, nor had any licence as such, and who had sent out to the defendant, at his desire, the tobacco in question, without a permit, were entitled to maintain this action against him for the value of it? Lord ELLENBOROUGH, Ch. J. thought that the plaintiffs were entitled to recover, and they obtained a verdict accordingly. But an objection having been made to the action on the ground of the requisites of certain Acts of Parliament not having been complied with by the plaintiffs to entitle them to sell this commodity, leave was given to the defendant's counsel to move to set aside the verdict and enter a nonsuit, if, upon further examination of the Acts, the objection should appear to be well-founded.

[*181]

Wigley accordingly moved to that purpose in the last Term, and stated the several provisions of the Acts, on which he relied.

JOHNSON
and Others
v.
HUDSON.

[*182]

The stat. 29 Geo. III. c. 68, for granting the duties on tobacco, enacts, (s. 70) that every person who shall deal in tobacco, shall, before he shall deal therein, take out a licence; which by s. 72 is to be renewed yearly, under a penalty of 50*l*. The stat. 30 Geo. III. c. 40, s. 4, enacts, that no tobacco (except Spanish or Portuguese) shall be imported either wholly or in part manufactured, on pain of forfeiting all such tobacco, with the packages, and also the ship in which it was imported. And by st. 43 Geo. III. c. 134, s. 5, prize tobacco is made subject to the regulations and forfeitures of the *former Acts. Upon these Acts he contended that none but a licensed dealer could legally deal in this commodity; and the dealing in it by every other person being made illegal, no action could be maintained upon any such contract of sale by the plaintiff, on the same principle which prohibits a recovery upon a smuggling contract.† The goods were also seizable in their transit without a permit, and afterwards in the stock of the vendee, which would have been by so much increased without any permit to cover and protect that increase. And he referred to *Gallini v. Laborie*,‡ where it was held that no action could be maintained for breach of an agreement to dance at an unlicensed theatre, the stat. 10 Geo. II. c. 28, prohibiting all theatrical representations without licence.

[*183]

The Court, in the absence of Lord Ellenborough, reluctantly granted a rule to shew cause; observing that here there was no fraud upon the revenue, on which ground the smuggling cases had been decided; nor any clause making the contract of sale illegal; but at most it was the breach of a mere revenue regulation, which was protected by a specific penalty: and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the Act. And when in this Term, the Court being full, it was moved to make the rule absolute; no counsel appearing on the part of the defendant to shew cause when the cause was called on in the paper *of new trials; Lord

† *Clugas v. Penaluna*, 2 R. R. 442 (4 T. R. 466); *Waymell v. Reed*, 2 R. R. 675 (5 T. R. 599).

‡ 2 R. R. 581 (5 T. R. 242); *Rib-*

bany v. Crickett, 1 Bos. & P. 264; *Blachford v. Preston*, 4 R. R. 598 (8 T. R. 89).

ELLENBOROUGH, Ch. J. said that the Court had considered the question since the rule was granted, and were all satisfied that no objection lay to the action; therefore they

JOHNSON
and Others
v.
HUDSON.

Discharged the rule.

DOE, ON THE SEVERAL DEMISES OF SUSAN BLACKSELL, JOSEPH PALMER, WM. CLARKE, AND SARAH HIS WIFE, JOSEPH COOKE, BENJAMIN WHITE, AND JANE HIS WIFE, AND MARY HARRIS, *v.* TOMKINS AND WIFE.

1809.
May 9.
[185]

(11 East, 185—188.)

Devisees of contingent remainders in a copyhold, not being in the seisin,† cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs.

THIS was an ejectment to recover possession of certain copyhold lands and buildings held of the manor of Thorpe-in-the-Soken, in Essex; the demises were laid on the 12th of January, 1808; and at the trial a verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

John Blacksell being seised to him and his heirs of the premises above described, and having duly surrendered them to the use of his will, by his will dated the 3rd of *January, 1761, devised them to his brother Thomas Blacksell for life; remainder to his nephew T. B. junior, son of his said brother, “for life; and, after his decease, unto such of my nieces, daughters of my said brother Thomas, which he had by Elizabeth his late wife deceased, as shall be then living, to be equally divided amongst them, share and share alike,” as tenants in common in fee. The testator died in 1769; whereupon Thomas Blacksell, sen. was admitted to the premises for life; and at a court baron held in July, 1774, T. B. jun. was admitted for his life in reversion, expectant on the estate for life in his father. At the same Court, Sarah the wife of R. Hackney, Elizabeth the wife of J. Burnby,

[*186]

† Cited by Wood, V.-C., in his judgment in *Rider v. Wood* (1855) 1 Kay & J. 644, 24 L. J. Ch. 737, 740.—R. C.

DOE dem.
BLACKSELL
v.
TOMKINS.

[*187]

Martha the wife of R. Wallis, and Mary, Jane, and Susan Blacksell, spinsters, the testator's six nieces, daughters of his brother Thomas by Elizabeth his wife, were severally admitted in fee to an undivided sixth part each, in reversion expectant on the two former life estates of their father and brother, and immediately surrendered to their brother Thomas; Sarah Hackney, Elizabeth Burnby, and Martha Wallis, being first severally and secretly examined apart from their respective husbands by the steward, according to the custom of the manor, and freely consenting; and T. Blacksell the testator's nephew was thereupon admitted in fee. The husbands of the three married sisters were no parties to their admissions or to the surrenders by them to their brother Thomas. Thomas Blacksell, sen. and jun. at the same Court mortgaged the premises for 500*l.* to J. Ratford, who afterwards made a further advance, and in 1784 had a surrender of the equity of redemption from the son; the father being then dead; and Ratford was thereupon admitted in fee, and surrendered to the use of his will. Ratford devised to trustees for the defendant Ann Tomkins *his only child; which trustees have been admitted as the devisees under his will; and she and her husband are in possession of the premises in question. Thomas Blacksell, jun. died 7th of June, 1801; at which time only four of the testator's nieces were living; namely, Susan, the first named lessor of the plaintiff, Sarah then the widow of R. Hackney, Martha then the wife of R. Wallis, and Mary then the wife of J. Harris. Martha, Sarah, and Mary, all died before the date of the demises in this ejectment. Joseph Palmer, the second lessor, is the grandson of Sarah Hackney by a deceased daughter, who with Sarah the wife of W. Clarke, the third lessors, were her co-heiresses. Joseph Cooke the fourth lessor is the heir of Martha Wallis, and Jane the wife of Benjamin White, and Mary Harris spinster, the remaining lessors, are the daughters and co-heiresses of Mary the wife of J. Harris. Elizabeth Burnby and Jane Blacksell, the only two other nieces of the testator, died in the lifetime of their brother Thomas Blacksell jun. The lessors of the plaintiff were duly admitted at the lord's court to their several proportions claimed in the premises on the 23rd of February, 1808. The question for the opinion

of the Court was, whether the plaintiffs were entitled to recover?

DOE dem.
BLACKSELL
v.
TOMKINS.

Marryat, for the plaintiffs, began by arguing that the testator's nieces had only contingent remainders at the time of the surrenders made by them, which surrenders were therefore incapable of being made, and could not operate by way of estoppel. And that the surrenders by the *feme covert*s, without their husbands, was clearly void, according to *Stevens v. Tyrell*.†

The Court, however, thought it unnecessary to hear him; it being clear that the remainders to the nieces were contingent; and being of opinion that a party who was not in the seisin could not surrender a copyhold; and that a surrender could not operate by way of estoppel, but could only pass what the party then had. And *Lawes*, who was to have argued for the defendants, admitting that he could not support their title on these grounds; the Court gave judgment for the

[188]

Postea to be delivered to the plaintiff.‡

† 2 Wils. 1.

Philips, 1 Ves. Sen. 230; and *Goodtitle*

‡ *Vide* 1 Watk. 210; *Taylor v. Morse*, 1 R. B. 719 (3 T. R. 365).

1809.
May 9.

FORSTER AND OTHERS v. CHRISTIE.†

(11 East, 205—210.)

[205]

A British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a King's ship in the Baltic from an apprehension of hostilities for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy till the King's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull: held that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear† of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance, by the King's officer, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo.

THIS was an action on a policy of insurance in the usual form, effected on the 8th of October, 1807, by the plaintiffs, and subscribed by the defendant for 400*l.* on woollens, on board the ship *Volga*, upon a voyage at and from Hull to the Sound and St. Petersburg, at a premium of ten guineas per cent., to return 2*l.* per cent. for convoy to the Sound or Belts, and 2*l.* per cent. more for any convoy in the Baltic and arrival. In the margin of the policy was a memorandum, that in case of partial loss or damage the neat proceeds were to be the basis of contribution. The interest was stated by the declaration to be in Dawson, Burrell, & Co., and the loss was averred in different counts to have happened of the goods and of the voyage by the perils of enemies, and by the arrest, restraint, and detainment of kings, princes, and people, and was also specially described according to the facts hereinafter stated. There were also counts for money had and received, and upon an account stated. The goods in question belonged to Dawson, Burrell, & Co., merchants of Wakefield, and were shipped by them on board the *Volga*, a British ship at Hull, in October, *1807; on the 10th of which month she sailed with convoy to the Sound, where she arrived on the 16th. She

[*206]

† Distinguished by BOVILL, Ch. J., in his judgment in *Rodonachi v. Elliott* (1873) L. R. 8 C. P. 649, 665, 42 L. J. C. P. 247, 28 L. T. 840,

where goods insured on through water and land transit, were detained in Paris during the siege of 1870-71. —R. C.

FORSTER
v.
CHRISTIE.

proceeded on her voyage, and was at anchor off the town of Drago on the 20th, when she was boarded by the crew of a boat from his Majesty's brig *Muscata*, with orders for the *Wolga* to put herself under the protection of the King's ships in Copenhagen Roads; and the boat's crew remained on board to enforce obedience to the orders. The *Wolga* weighed anchor accordingly, and came back to Copenhagen Roads, where she remained until the 31st, when she went to Helsingberg Roads for convoy, and remained there waiting for convoy until the 7th of November, when she sailed on her voyage under convoy of his Majesty's sloop of war the *Ganet*. The *Wolga* proceeded on her voyage in the Baltic until the 16th of November, when the commander of the *Ganet* informed the captain of the *Wolga* that an embargo was laid on the 15th on all British ships in the Russian ports, and ordered the *Wolga* to proceed no further on her voyage, but to keep close by him, and that the *Wolga* should receive orders from the commander in chief in Copenhagen Roads as to her future destination. When the *Wolga* arrived off Copenhagen she was ordered by the King's officers to proceed down to Helsingberg Roads; and afterwards the captain, under all the circumstances of the case, thought it best to proceed to England, which he did accordingly under convoy of his Majesty's brig the *Providence*, and arrived at Hull on the 11th of December, 1807. An embargo was in fact laid in the ports of Russia upon all British ships on the 15th of November, 1807, and war was declared and hostilities commenced by Russia against Great Britain on the 18th of December, 1807, and continued from that time to the present. If the *Wolga*, however, had not *been detained by the King's officers she would have arrived according to the usual course of the voyage at St. Petersburg, and delivered her cargo there, previous to the laying on of the embargo. Upon the ship's arrival in the Humber, the goods insured were safely landed and deposited in the same state as when first put on board in the warehouses of the plaintiff's agents, where they remained when the action was brought. On the 28th of December the plaintiffs abandoned the goods to the defendant and the other underwriters. A verdict was taken at the trial for the plaintiff, subject to the opinion of this Court on the facts above stated: and if the plain-

[*207]

FORSTER v. CHRISTIE. tiffs were entitled to recover, the verdict was to stand : otherwise, a nonsuit was to be entered.

[*208]

Taddy, for the plaintiffs, contended that the voyage had been lost by a peril insured against, and therefore the assured were entitled to abandon. The voyage might have been performed but for the detention of the King's officers; and such a detention is within the terms of the insurance against "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." The general word "capture" has indeed been held † not to extend to British capture; but that is on the ground of public policy, because it tends to throw the loss on British subjects instead of upon the enemy, and so to paralyze the warfare of the State: but nothing of State policy intervenes in this case; for where the contract of insurance is between two subjects of the realm, and the question is on whom a certain loss is to fall which must take place, the State has no interest in the *decision, unless it be that the burden should be divided as much as possible, which it is the object of such a contract to effect. Where a loss may fall upon some one or other of innocent subjects, in order to promote the general welfare against the acts of an enemy, there can be no reason why one subject should not contract to indemnify another against the risk; in like manner as landlord and tenant often contract to indemnify each other against certain taxes; which, as between themselves, if not specially directed otherwise by law, is good. Suppose it had been necessary for the public service to have taken the ship altogether in order to employ her against the enemy, by whom she had been captured or damaged, on what principle could it have been contended that the underwriters would not have been liable.‡ In *Green v. Young*,§ where a British ship was seized by the government and converted into a fire ship, Lord HOLT at Nisi Prius considered that the underwriters would be liable: and this opinion was approved of by Lord KENYON in *Rotch v. Edie*.|| And in *Goss v.*

† Vide *Kellner v. Le Mesurier*, 7 R. B. 581 (4 East, 396, 402), and *Lubbock v. Potts*, 7 East, 451.

‡ Vide Park on Insurance, chap. 4, 6th edit. p. 106, &c. where several

late cases are mentioned.

§ 2 Ld. Ray. 840, and 2 Salk. 444.

|| 3 R. B. 222, 228 (6 T. R. 413, 422, 3).

Withers† Lord MANSFIELD says, that by the general law the assured may abandon in the case merely of an arrest on an embargo by a prince not an enemy. The opinions of foreign jurists are strong to this effect: as in 2 Val. 134. If after the voyage commenced the ship put into a harbour, be it into the same or any other, and be there stopped by order of the king, the assurance shall have effect, so that the assured may abandon in the same manner as if it were the act of a foreign prince.

FORSTER
v.
CHRISTIE.

(Lord ELLENBOROUGH, Ch. J. asked, on which act of *detention the plaintiff's counsel relied, as the act occasioning the loss of the voyage, which entitled him to abandon? To which it was answered, the first principally.)

[*209]

Carr, *contra*, was stopped by the Court.

LORD ELLENBOROUGH, Ch. J. :

This is no more than a detention by the convoy for a certain period, till by the laying of a hostile embargo in the destined port, the further prosecution of the adventure became impracticable and the voyage was lost; which according to *Hadkinson v. Robinson* † is not a loss within the policy. There was indeed a detention by the King's ship, but there was no loss on that detention. Suppose there had been fair weather to a certain point of the voyage, and then bad weather and adverse winds, which had prevented the vessel from entering her port of destination till she had received advice of the embargo which obliged her to put back; could that have been declared upon as a loss by the perils of the sea? and yet that might as well be said to be the *causa remota* of the loss of the voyage, as the detention in this case: but that will not do; the risk insured against must be the effective cause of the loss, in order to charge the underwriters. But here there was the concurrence of another overbearing cause, namely, the hostile embargo in the destined port, which was the immediate cause of the ship's return and of the loss of the voyage: and the King's officer only prevented the

† 2 Burr. 696.

† 7 R. B. 786 (3 Bos. & P. 388).

FORSTER
v.
CHRISTIE. ship from going into the enemy's port, and incurring a loss by capture; and such detention is not within the meaning of the clause against "the arrest and detainment of kings," &c. Lord ALVANLEY, in the case of *Hadkinson v. Robinson*, said that in order to bring the loss within the policy, the peril insured against which occasions *it must act directly, and not collaterally, upon the thing insured.

[*210]

The rest of the Court agreed; and BAYLEY, J. added, If the port of St. Petersburg had continued open, and there had been no embargo and no war between this country and Russia, it could not have been pretended that the prior detention by the King's ship would have been a loss within the policy.

Per CURIAM :

Postea to the defendant.

RUGG AND OTHERS *v.* MINETT AND OTHERS.†

(11 East, 210—219.)

1809.
May 9.

[210]

Where turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent; and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to guage them; but before he could fill up the rest a fire consumed the whole in the warehouse within the thirty days: held that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them guaged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the guaging, must be taken to have been done as agent for the buyers, whose concern the guaging was. But the property in the casks not filled up remained in the seller, at whose risk they continued.

In an action for money had and received by the defendants to the use of the plaintiffs, a verdict was found for the plaintiffs for 1,415*l.*, subject to the opinion of the Court upon the following case.

On the 28th of April, 1808, the defendants, as prize agents to the commissioners for the care and disposal of Danish property, put up to public sale by auction, at Dover, the cargo of a Danish ship in lots, and the lots No. 28 to 54 inclusive consisted of turpentine in casks. *The quantity contained in each lot being marked on the catalogue thus—10 cwt. 3 qrs. 26 lbs., the mode of bidding was this; each lot (except the two last, which were sold at uncertain quantities) was to be taken at the weight at which

[*211]

† This is perhaps the leading case on a principle, for which the authorities are numerous. As one of the most recent of the train of cases following it, may be cited that of *Anderson v. Morice* (1875) 10 C. P. 609 (see particularly the judgment of

BLACKBURN, J., p. 616), 44 L. J. C. P. 341, 32 L. T. 355, and (1876) 1 App. Cas. 713, 739, 46 L. J. C. P. 11, 35 L. T. 506. But it is to be observed that the question of risk in that case did not necessarily depend on the property.—B. C.

BUGG
v.
MINETT.

[*212]

it was marked, and the bidding was to be at so much per hundred weight on that quantity. The plaintiffs employed one Acres, the warehouseman of the defendants, to bid for them, and all the lots of turpentine, (with the exception of 3 lots, which were sold to other bidders,) were knocked down to Acres so acting for the plaintiffs. No conditions of sale were distributed prior to the sale; but the auctioneer, before the bidding commenced, read aloud the following conditions: 1st, The highest bidder to be the buyer; but if any dispute should arise, the lot to be put up again. 2nd, 25*l.* per cent. is to be paid to the auctioneer as a deposit immediately after the sale, and the remainder in 30 days. The remainder of the purchase-money is to be paid on the goods being delivered. Should the goods remain after the limited time, the warehouse rent from that time to be paid at the rate of 2*s.* per ton per month, by the purchaser. 3rd, The goods to be taken at the neat weight printed in the catalogue. 4th, The goods to be taken away in 12 months, or resold to pay the warehouse rent. Upon failure of complying with these conditions, the deposit-money is to be forfeited, and the commissioners to be at liberty to resell any lots belonging to defaulters, by whom all charges attending the same shall be made good. 1*s.* per lot under 10*l.*—1*s.* 6*d.* from 10*l.* to 25*l.*—and 2*s.* above 25*l.* lot money to be paid by the buyer to the auctioneer. Tare allowed for turpentine 1*s.* 5*d.* Upon the turpentine being put up to sale, the auctioneer, by the direction of one of the defendants present, announced *to the bidders that the casks of turpentine were to be filled up before they were delivered to the purchasers; and that in order to effect this, the two last lots would be sold at uncertain quantities, and the preceding lots would be filled from them. The whole of the turpentine, with the exception of the 3 lots before mentioned, were sold to the plaintiffs; and they also were the purchasers of the two last lots, from which all the lots without exception were to be filled up; and those two last lots were accordingly marked by the auctioneer in his catalogue with the words "more or less." Immediately after the sale 200*l.* was paid by the plaintiffs to the auctioneer, as their deposit; and on the 9th of May, 1808, the plaintiffs paid to the defendants 1,715*l.* upon account of the

RUGG
v.
MINETT.

turpentine, and the duties payable thereon. The turpentine remained in the warehouses of the defendants as before the sale, but was entered at the custom-house at Dover, in the name of the plaintiffs, on the morning of the 10th of May, 1808, before the fire, by Acres, who paid on behalf of the plaintiffs 450*l.* as a deposit for the duties. On the same morning the cooper, who had been employed by the defendants to make up all the casks previous to the sale of the 28th of April, was sent for by Acres, who was warehouseman to the defendants, and who acted as agent for the plaintiffs, to fill up the casks of turpentine, and he had filled all of them except 8 or 10 ; leaving them with the bungs out to enable the custom-house officer, who was expected every minute, to take his guage in order to ascertain the duties. The two last lots, which were sold at uncertain quantities, and marked "more or less," contained more turpentine than was sufficient to fill up all those bought by the plaintiffs, and also those bought by the buyers of the three lots. *In filling the casks sold to the plaintiffs one of the two last lots was used, and instead of the other of the two last lots, a preceding cask in point of number, which had been found to be an ullage cask, was substituted by the cooper, and from one of the two last lots the lots sold to the other buyers had been previously filled up. All the lots sold to the other buyers had been taken away before the cooper came on the 10th ; and while the cooper was employed in filling up the plaintiffs' lots, and placing them ready, with the bungs of the casks out for the custom-house officer to guage, but before he had filled up all the casks, or bunged any of them, a fire took place in the defendants' warehouse, which consumed the whole of the turpentine knocked down to the plaintiffs ; the casks not having been weighed again by the plaintiffs, or guaged by the custom-house officer. While the money paid by the plaintiffs to the defendants on account of the turpentine remained in their hands, they received notice from the plaintiffs not to pay it over ; and the present verdict is composed of that sum, deducting the 450*l.* paid on account of the duty, which had been restored to the plaintiffs by the commissioners of customs. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover back the money so paid to the

[*213]

RUGG
v.
MINETT.

defendants ? If they were, the verdict was to stand : if not, a nonsuit was to be entered.

[*214]

Puller, for the plaintiffs, contended that the contract for the sale was still executory† at the time of the loss by fire, inasmuch as there still remained something for the vendors to do, and consequently that the loss must *fall upon them, and not upon the vendees. By the conditions of sale 30 days were to be allowed to the vendees for taking the casks from the warehouse of the vendors, and before they were removed the vendors were out of the two last casks to fill up all the rest, so as to make them correspond with the weights at which they were marked : and that was the more material, because until it was done, it could not be ascertained what was the whole price to be paid, as those two casks were to be paid for according to their contents, after the rest were filled up : the weighing of them therefore must necessarily precede the delivery, and the remainder of the whole purchase money was to be paid on the delivery of the goods. This brings the case within the decision of *Hanson v. Meyer*,‡ where the vendee had agreed to purchase all the starch of the vendor then lying in the warehouse of a third person at so much per cwt. by bill at two months, the weight of which starch was afterwards to be ascertained, and 14 days were to be allowed for the delivery : and the vendor having given a note to the vendee addressed to the warehouseman, directing him to weigh and deliver to the vendee all his starch ; the Court held that the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery and to ascertain the price ; and that the vendee having become bankrupt before the whole had been weighed and delivered, the vendor might retain the remainder. It is true that in that case the whole was to be weighed before delivery ; and here only the two last casks : but here also all the prior casks were to be filled up, which was not done at the time of the loss ; and none of them were in a condition to be delivered, as the bungs *were left out, in order to permit the custom-house officer to guage the casks, without which they could not be removed, and it was part of the business

[*215]

† 1 Com. Dig. 341.

‡ 8 R. R. 372 (6 East, 614).

RUGG
v.
MINETT.

of the vendors to replace the bungs, and put the casks in a proper condition to be delivered. In *Hammond v. Anderson*,† all the bales lying at a wharf, which had been sold for an entire sum, had been taken possession of by the vendee and weighed, and part had been removed by him before his bankruptcy; and therefore it was held that the vendor had no right to stop what remained in the hands of the wharfinger. In *Hinde v. Whitehouse*,‡ though the sugars were in the King's warehouses under the locks of the King and the owner, from whence they could not be removed till the duties were paid, which were to be paid by the sellers; yet they had been weighed and the duties ascertained; and one of the conditions of sale at the auction was, that the sugars were to be taken with all defects as they then were, at the King's weights and tares, with the allowance of draft, or re-weighed giving up the draft, and to be at the purchaser's risk from the time of the sale; by which latter was evidently meant, from the time when the lot was knocked down to the highest bidder: and besides, the acceptance of the sample by the purchaser, as part of the thing purchased, was held to bind the sale. If a horse were sold, and agreed to be delivered by the vendor after he was shod; and the horse died before; the loss would fall upon the vendor. So here, the act of filling up the casks was to be performed by the vendors before delivery: and though if the case rested upon that circumstance alone, a distinction might be taken as to those casks which had been filled up; yet the vendees *were entitled to have the whole re-bunged before delivery.

[*216]

(Lord ELLENBOROUGH, Ch. J. observed, that the vendees were entitled to have the casks filled up and the bungs belonging to them; but that the vendors had no concern with the unbunging or bunging of them, the former of which was done on account of the custom-house officer intervening to do his duty before the goods were removed by the vendees. And upon inquiry at whose instance the guaging was to be performed, it was admitted that the vendees could not have removed the goods till they were guaged; and therefore the Court considered that it was their

† 8 R. R. 763 (1 Bos. & P. (N. R.) 69).

‡ 8 R. R. 676 (7 East, 558).

BUGG
v.
MINETT.

duty to get them guaged. The Court also inquired as to the number of casks which had been filled up : and it was agreed that all had been filled up except 10 ; on which they asked the defendants' counsel what answer he had to give to those 10.)

Carr, for the defendants, admitted that the vendors could not claim the value of the two casks, out of which turpentine had been taken to fill up the others, because the quantities they contained were not ascertained by weighing at the time of the loss : but with respect to the last 10 which had not been filled up, he still contended that the property passed by the sale ; for by the contract the mark on each cask was conclusive as to the quantity and the price being also ascertained, every thing material to the perfection of a contract of sale was complete : and at any rate the vendees should have called upon the vendors to fill up the remainder.

(Lord ELLENBOROUGH, Ch. J. Still the fact is, that by the vendors' not having filled up the last ten casks, they were not in a deliverable state at the time of the loss ; and it was certainly a material act to be done, to make up the quantity marked.)

[*217] The *warehouseman who was to do it was the common agent of both : and *this case is so far distinguishable from that of *Hanson v. Meyer*, that there the vendee could not have removed the goods till they were weighed ; but here the quantity and price being ascertained, the vendees might have waived calling on the vendors to fill up the casks, and might have taken them away when they pleased.

LORD ELLENBOROUGH, Ch. J. :

The Court have already intimated their opinion, as to those casks in the first lots which were filled up, and on which nothing remained to be done on the part of the sellers, but only the casks were left to remain for 30 days at the option of the purchasers in the warehouse at the charge of the sellers : the payment of the warehouse rent however is not material in this case : and when the casks were filled up, every thing was done

which remained to be done by the sellers. It was necessary however that they should be guaged before they were removed, and the bungs were left out for the purpose of the guager's doing his office, which it was the buyer's business to have performed; and therefore according to the case of *Hanson v. Meyer*, and the other cases, every thing having been done by the sellers, which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them.

RUGG
v.
MINETT.

LE BLANC, J.:†

[218]

The case is to be considered as involving so many distinct contracts as there were distinct lots bought by the plaintiffs. The turpentine was purchased at so much per cwt., and it was to be taken according to the weight marked on each lot; but the casks were to be filled up by the sellers out of turpentine belonging to them, in order to make the weights agree with the marks. I say belonging to the sellers, because the two last casks were only sold according as their actual weights should turn out to be, after filling up the rest: and if more turpentine had been wanted than those casks could have supplied for filling up the rest, it must have been settled which of the respective purchasers was to take less than his calculated quantity. Till the several casks therefore were filled up I consider the property as remaining in the sellers. But a certain number of casks were filled up; and with respect to them nothing further remained to be done by the sellers. But it was necessary that the custom-house officer should guage them before they could be removed. Then the warehouseman who was acting as the common agent of the buyers and sellers, having filled up those casks, on the part of the sellers, left them unbunged for the purpose of the officer's guaging them, and ascertaining the duties, which was an act to be done on the part of the buyers, to entitle them to

† Grose, J., was indisposed and absent.

RUGG
v.
MINETT.

remove the goods. Then as nothing more remained to be done by the sellers on those casks which were filled up, they were from that time at the risk of the buyers : but those which were not filled up continued at the risk of the sellers.

[219] BAYLEY, J. :

In many cases it happens, where every thing has been done by the sellers which they contracted to do, that the property passes to the buyers, though the goods may still continue in the actual possession of the sellers. It lies upon the plaintiffs then to make out, that something still remained to be done to the goods by the sellers at the time when the loss happened. But with respect to those casks which had been filled up, nothing remained to be done but the gauging by the officer, and as that was to be procured to be done by the buyers, Acres, who left out the bungs for the purpose of enabling the officer to gauge, must be taken to have acted as the agent of the buyers for that purpose ; and therefore nothing more remaining to be done by the sellers, the property passed. But with respect to the other casks, something did remain to be done by the sellers, namely, the filling them up : and it is not sufficient for them to say that they were not called upon to do so by the buyers ; for if they meant to relieve themselves from all further responsibility, they should have done what remained for them to do, and until that was done the property continued in them.

Upon this it was agreed that the proportion to be allowed to the plaintiffs on the ten casks should be settled out of Court ; and that the verdict should be entered accordingly.

DRING v. DICKENSON.

(11 East, 225—226.)

1809.
May 10.

[225]

If a defendant be served with a writ by a wrong christian name of W., and do not appear to it, the plaintiff cannot file common bail for him in his right name of E., sued by the name of W., nor declare against him *de bene esse* in that form; and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea.

THE defendant, whose christian name was Edward, was served with a writ on the 18th of April, in which he was sued by the name of William; and not having appeared to it, the plaintiff, on the 28th of April in this Term, filed common bail for him in his right name of Edward, sued by the name of William, and also served him with notice of a declaration *de bene esse* by the name of Edward, sued by the name of William, and with notice to plead in 8 days. No plea having been filed within the time, the plaintiff signed interlocutory judgment, and gave notice of executing a writ of inquiry. Whereupon *Espinasse* having obtained a rule for setting aside the proceedings for irregularity;

Puller now shewed cause, and referred to *Oakley* and *Giles*,† where, in a penal action, the defendant having *been sued by a wrong name, but served with notice of declaration in his right name, the Court held a judgment signed for want of a plea regular; saying, that pleas in abatement might be struck out of the books, if judgments could be set aside for such misnomers: and also to *Delanoy v. Cannon*,‡ where, though the Court set aside the proceedings under similar circumstances, upon objection urged before plea; yet they distinguished it on that ground from the prior case of *Oakley v. Giles*. He observed that, in this case, common bail having been filed for the defendant by his right name, and he having had personal service of a notice of declaration by his right name, should have come in the first instance to stay proceedings, and not have waited till judgment had been signed.

[*226]

† 3 East, 167.

‡ *Ante*, p. 315 (10 East, 328).

DRING
v.
DICKENSON.

But the COURT held the judgment to be irregular, on the ground that the plaintiff, having sued out process against the defendant by a wrong name, could not cure that defect by his own act of filing common bail for the defendant, and serving him with notice of declaration *de bene esse* by his right name.

Rule absolute.

1809.
May 13.

THE KING v. THE JUSTICES OF KENT.†

(11 East, 229—231.)

[229]

A mandamus to the justices in Sessions, to allow an item of charge in the coroner's account, refused; because the justices were of opinion under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death, and therefore that the inquisition had not been duly taken; and this Court seeing no reason for interfering with that judgment.

[*230]

GARROW moved for a mandamus to the defendants to allow an item (which they had before rejected) in the coroner's account, for his fee on an inquisition taken by him on the body of John Sutton. This application was made on the affidavit of Mr. De Lasaux, coroner of the county of Kent, stating that in December last he was sent for by the parish officers of Wye in that county, to take an inquest on view of the body of T. Austen, supposed to have been killed by the kick of a horse. That he went there and took the inquest; and on his arrival at the inn where the jury were assembled, several *of them informed him that there was another inquest for him to take, as one John Sutton, who had lately come from Surrey to reside at Wye, had just before the coroner's arrival died suddenly in a shop in the town while he was purchasing some furniture. That in consequence of this information, after the inquest on Austen was taken, the coroner re-swore the jury to inquire into the cause of Sutton's death, in pursuance of the stat. 4 Ed. I. st. 2, directing the coroner to go to the place where a person is slain or suddenly dead. That it appeared in evidence before the coroner, that Sutton went into Mr. Howard's shop apparently in very

† Confirmed and followed in *Reg. v. Justices of Caermarthenshire* (1847) 10 Q. B. 796, 16 L. J. M. C. 167.—R. C.

good health ; that he complained of a pain in his hip, sat down in a chair in the shop, and suddenly died. In consequence of which evidence, and that of the surgeon who was immediately sent for to attend him, and who endeavoured to restore him but without effect, the jury returned a verdict of, died by the visitation of God. That on carrying in his bill to the last Easter Sessions pursuant to the stat. 25 Geo. II. c. 29, the coroner charged the county 1*l*. for the last-mentioned inquisition, when the magistrates disallowed this charge, being of opinion that the inquisition had been improperly taken. The mandamus was now pressed for on the ground that the item ought to have been allowed ; the death having been in fact sudden, and the coroner having been called upon by respectable inhabitants of the place to execute his office before he had interfered : and the refusal of the magistrates to allow it being felt by the coroner as an imputation of improper practice on his part.

THE KING
v.
THE
JUSTICES OF
KENT.

The Court, however, exculpated the coroner from the imputation of any intentional improper practice in the particular instance, as the taking of the inquisition seemed *to have been suggested to him by others. Though Lord ELLENBOROUGH, Ch. J. observed that there were many instances of coroners having exercised their office in the most vexatious and oppressive manner, by obtruding themselves into private families to their great annoyance and discomfort, without any pretence of the deceased having died otherwise than a natural death ; which was highly illegal. But the Court still thought that there was no sufficient ground for the present application ; for the statute had directed that the fees should be allowed to the coroner for all inquisitions duly taken ; and the justices were to judge whether the inquisition in question had been duly taken ; and there was no reason for imputing to them that they had exercised their judgment with any undue bias ; and the Court did not see any occasion to interfere with that judgment in this instance.

[*231]

Rule refused.

1809.
May 13.

[232]

PULLER AND ANOTHER v. STANIFORTH.

(11 East, 232—244.)

Freighters chartered a foreign ship to take a cargo from London to St. Petersburg, and to load a cargo there and immediately return to London, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at St. P. for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, the master should be at liberty to return to London, and the freighters should pay him 2,500*l.* immediately upon the arrival of the ship at London. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss in case the ship was not allowed by the Russian Government to load a cargo at St. P. on the chartered voyage. In fact the Russian Government, when the ship arrived at St. P. presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to London, and earned freight thereon. Held, 1. That the insurance was legal in the terms of it.

2. That the refusal of the Russian Government to permit the ship to unload her outward cargo, was, in effect and within the meaning of the contracting parties, a refusal to allow her to load a cargo at St. P.; and consequently that a total loss within the policy was incurred.

3. That the proceeding directly from St. P. to London was not a condition precedent to the master's right to recover from the freighters the dead freight of 2,500*l.*; but that he was entitled to the same notwithstanding the intermediate voyage to Stockholm, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But,

4. That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from Stockholm to London, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity.

THIS was an action on a policy of assurance in the common printed form, with none of the blanks filled up, but containing the following memorandum written at the bottom of it. "In consideration of 10 guineas per cent. hereby received, we, the underwriters on this policy, agree to pay a total loss, in case the ship *Ann*, Capt. Flower, is not allowed by the Russian Govern-

ment to load a cargo at St. Petersburg on the voyage he is at present chartered by Messrs. C. & R. Puller." The declaration, after setting out the policy, of which the *defendant on the 26th of April, 1808, became an underwriter, proceeded to state, that on the 18th of April, 1808, by a certain charter-party of affreightment of that date between S. Flower, master of the American ship *Ann* of New York, then in the port of London, and the plaintiffs, Flower let the said ship to freight to the plaintiffs for the voyage on certain terms and conditions; whereby Flower covenanted that the ship should be properly manned, &c. and provided for her intended voyage, and take on board from the plaintiffs a full and complete cargo of all such lawful goods as they should put on board, and immediately depart with the same from the port of London, and proceed to St. Petersburg in Russia, and then and there unload and make a right and true delivery and discharge of all the said cargo to the agents of the plaintiffs; and upon delivery and final discharge of all the said cargo so put on board at London, that Flower should immediately receive and take on board the said ship at St. Petersburg from the plaintiffs' agents a full and complete cargo of hemp and such other goods as they should think proper to load, &c.; and the said cargo so being loaded and the ship dispatched, that she should immediately proceed and return to the port of London, and then and there make a right and true delivery of all the said cargo of hemp and other goods so put on board at St. Petersburg. In consideration whereof the plaintiffs covenanted with Flower, that they should provide the ship with a British licence, and not only put on board the said cargo at London, and on her arrival at St. Petersburg unload the same, and thereupon put on board such return cargo of hemp, &c. and on her arrival at London unload and receive the same, but also should pay to Flower in full for the freight of the *ship at the rate of 10*l.* per ton, with 10*l.* per cent. for primage, and 100 guineas as a gratification to him as master, immediately upon the delivery of the return cargo at London. And Flower covenanted, that if political or other circumstances should arise to prevent the shipping a return cargo, or discharging the outward cargo, the plaintiffs or their agents

PULLER
v.
STANFORTH.

[*233]

[*234]

PULLER
v.
STANFORTH.

should be at liberty to detain the ship at St. Petersburg for 40 running days in the whole after her arrival there. And the plaintiffs covenanted, that after the ship should have remained at St. Petersburg for 40 running days, without such outward cargo being unloaded and delivered, and consequently without the return cargo being put on board, Flower should be at liberty to return with his vessel to London or any other port in England: and that the plaintiffs should pay Flower 2,500*l.* immediately upon the arrival of the ship at London or any such port in England. The plaintiffs then averred that afterwards on the 26th of April, 1808, the ship so taken to freight had a licence from the British Government for the voyage in the policy and charter-party mentioned; and that the plaintiffs were interested in the voyage insured to the amount of what was so agreed to be paid to Flower for the use of his ship: that she afterwards sailed from London upon the said voyage, and arrived at St. Petersburg; but was not allowed by the Russian Government to load a cargo at St. Petersburg on the said voyage chartered, &c.; and after remaining there 40 days, without unloading and delivering her outward cargo, and without a return cargo being put on board her, she departed from St. Petersburg and arrived at London: by reason of which premises the defendant became liable to pay to the plaintiffs 200*l.* the amount of his insurance. There were also the common money counts. The defendant pleaded a *tender of the premium, which was admitted, and the general issue to the rest of the demand.

[*235]

The facts proved at the trial were in substance the same as stated in the first count: the ship which was American sailed on the insured and chartered voyage with a British licence: but when she arrived at St. Petersburg, it appearing upon examination of the captain that he had come immediately from England, with which Russia was then at war, he was refused permission to unload his cargo, being presumed to be British, though no particular examination of it was had; and being obliged to depart with his original cargo, and without any return cargo, the captain, judging as he thought for the best, determined to proceed to Stockholm, to see if he could dispose of his cargo

there. He did accordingly proceed to Stockholm, and disposed there of his outward cargo of lead, though to disadvantage; and also took in other goods there, and returned from thence to the port of London: and freight was made on the goods shipped at Stockholm and brought home.

PULLER
v.
STANIFORTH.

The plaintiffs went at the trial for the amount of the dead freight stipulated by the charter-party to be paid to Flower, amounting to 2,500*l.*: or if not entitled to the whole of it, to so much of it as would remain after deducting the amount of the freight earned by the ship from Stockholm to London. The defendant on the other hand contended at the trial, first, that this was in effect a wagering policy, for the underwriters to pay 2,500*l.* if the government of Russia would not suffer the ship to load at St. Petersburg; and was therefore illegal; (and this objection, if any, appeared on the record.) But, 2ndly, supposing it to be legal, that the assured were bound to have *presented the ship at St. Petersburg in a condition to receive a home-ward-bound cargo, without any obstacle interposed by their own act to the obtaining permission to load from the Russian Government: whereas it appeared that the refusal of the Russian Government to permit the ship to load was founded altogether upon the nature and property of her outward-bound cargo then on board, which from the circumstances of the case was concluded to be British; and not upon any objection to permit their own export trade. And it was argued to be a very different question whether a foreign Government would allow of an import trade from a particular country, or of their own export trade. That by the terms of the policy the underwriters were entitled to insist, as a condition precedent, that the ship should be presented at St. Petersburg in a condition ready to receive on board a Russian cargo, in which case it did not appear that the Russian Government would have refused its permission; the only refusal given by it being to unload a British cargo; against which the underwriters had not undertaken to indemnify the plaintiffs. 3rdly, It was objected (which went only to the quantum of the verdict,) that this being a contract of indemnity, and as the plaintiffs would be entitled to deduct out of the dead freight of 2,500*l.* payable to Flower the amount of

[*236]

PULLER
v.
STANFORTH.

the freight earned by him in the course of the voyage home from Stockholm, the underwriters were also entitled to have the same deduction made. The plaintiffs having recovered a verdict at the trial (which was taken for the whole sum) these grounds of objection were stated again upon a motion in arrest of judgment, for a new trial, or for a proportionable deduction from the sum recovered.

[237]

Garrow and Puller shewed cause against the rule :

1st. This is no wagering policy, but strictly for an indemnity against any loss under the charter-party. The ship was chartered to proceed outwards with a cargo of British goods, and return with a Russian cargo instead; and if the assured could not dispose of the first and procure the second, they would be subject at all events to the payment of dead freight; and against this eventual loss it was the object of the policy to indemnify them. The insurance therefore, which was to protect an adventure for the exchange of British for foreign commodities, was strictly legal. The insurance of any event is not prohibited by the st. 14 Geo. III. c. 48, if the assured be really interested in it, and the event itself be not illegal :† and it cannot be denied that the plaintiffs had an interest in the event. 2ndly, It is neither expressed in the terms, nor can be inferred from the nature of the contract of insurance, that the assured engaged that the ship should be in a condition to receive a homeward cargo by the delivery of the outward cargo. On the contrary, the memorandum in the policy refers to the charter-party, in which the nature of the adventure is disclosed; stating the outward cargo to be goods shipped by the plaintiffs from the port of London; and the event is therein provided for “if political or other circumstances should arise to prevent the shipping a return cargo or discharging the outward cargo.” And under this charter-party the ship sailed with a British licence. It is impossible therefore to imply a condition that the ship should at all events be empty at St. Petersburg.

[*238]

3rdly, The captain's proceeding to Stockholm was wholly *out of

† Reference was made to what was said by LAWRENCE, J. in *Lucena v. Craufurd*, in error, in Dom. Proc. 6

R. R. 659, 684 (2 Bos. & P. (N. R.) 300), &c.

the charter-party, and a new adventure resting upon his personal responsibility. Whether he may have rendered himself liable in damages to the plaintiffs for having taken upon him to dispose of their property in a manner unauthorized by and disadvantageous to them, is another question with which the underwriters on this policy can have no concern; for the loss which they have undertaken to indemnify accrued before the voyage to Stockholm. But at any rate this objection only goes to the quantum of the verdict; and if the Court should be of opinion that the freight earned in that voyage may be deducted by the plaintiffs out of the amount of the dead freight they have engaged to pay to Flower, considering the policy in question on the strict ground of indemnity, as in *Godsal v. Boldero*,† the quantum of the deduction may be ascertained by an arbitrator.

PULLER
v.
STANFORTH.

(Lord ELLENBOROUGH, Ch. J.: An unforeseen event has recouped part of the total loss; which brings the case within the principle of *Godsal v. Boldero*; this being strictly a contract of indemnity: the plaintiffs must therefore write off the difference.

LE BLANC, J.: Supposing any loss to have happened upon the sale of the lead at Stockholm, that was part of the adventure, and cannot affect the question of freight; the loss of which has evidently been diminished *pro tanto* by the freight earned from Stockholm.

BAYLEY, J.: The freight received on the cargo brought from Stockholm, on account of the plaintiffs, has paid part of the total loss which had at one time accrued.)

The *Attorney-General*, *Park*, and *Wigley*, in support of the rule, after slightly touching on the first question, as *thrown out for the consideration of the Court, whether the event insured were such as it was legal for a subject of this country to speculate upon in a policy, proceeded to urge the second objection on the same ground as before; that the risk of the underwriters was much enhanced by the nature of the outward-bound cargo, a risk not contemplated by them, or provided for in the terms of the

[*239]

† 9 East, 72.

PULLER
v.
STANFORTH.

policy ; which was attempted to be enlarged so as to indemnify the assured against the risk of not being permitted to unload a cargo of British goods in order to load a Russian cargo. The underwriters were not bound to look into the licence granted by the British Government, which was only required in order to legalize the voyage to St. Petersburg in the existing state of things. The underwriters laid a wager with the plaintiffs, that the Russian Government would let the ship load a cargo at St. Petersburg ; and the evidence is that when she arrived there, that Government would not suffer her to unload a British cargo : she was never therefore in a condition to ask for a Russian cargo, which the assured impliedly engage that she shall be, without any obstruction interposed by their own act. On the last point they urged, that if the captain could not recover the whole of the dead freight against the plaintiffs who had chartered his ship, by reason of her having earned a certain proportion of freight from Stockholm to London, the plaintiffs could not be entitled to recover the whole from the underwriters on a contract of mere indemnity, as this was.

[*240]

The *Attorney-General* then started another objection, that, by the terms of the charter-party, Captain Flower, if not permitted to unload at St. Petersburg, was (after waiting 40 running days there if required) “ to return with his vessel to London or any other port in England ; ” *which must necessarily be understood that he was to return with the outward cargo directly to London, &c. from St. Petersburg ; and on that condition only the plaintiffs covenanted to pay him the 2,500*l.* for dead freight, “ immediately upon the arrival of the ship at London, &c.” The captain therefore not having performed this condition, but having upon his own judgment proceeded upon a different voyage and adventure to Stockholm, and there disposed of the cargo to a loss, is not entitled upon the charter-party to recover the stipulated sum ; and consequently the plaintiffs cannot recover upon this contract of indemnity.

LORD ELLENBOROUGH, Ch. J. :

I have no doubt upon any of the grounds on which this case was originally argued. First, I see nothing illegal in a contract

entered into by British freighters for dividing their loss with underwriters in case a foreign port, to which it was lawful for them to ship the goods, should be shut against them. They have no interest in conducing towards the event, or in promoting war between the two countries. But the event against which they were desirous of being protected, not being within the common perils insured against, was supplied by a special memorandum, referring to the voyage on which the vessel was then chartered. I have no difficulty therefore in considering this as a contract legal in its terms. But then it is said that the underwriters have only insured against the risk of the Russian Government not permitting the ship to load a cargo at St. Petersburg. But looking to the nature of the adventure and the risk insured, the underwriters must have contemplated the event which happened. It was not likely that a vessel should be permitted to load a cargo there, *if the Russian Government would not permit its subjects to receive the cargo then on board : the refusal therefore to unload the outward cargo was in effect a refusal to permit a Russian cargo to be loaded, and brings the case within the plain meaning of the policy. Then the only question is that which has been recently made, whether the 2,500*l.* is demandable at all by Captain Flower against the plaintiffs, by reason of his not having proceeded directly to England from St. Petersburg? At present it does not appear to me that there is any express covenant on his part to do so, so as to make it a condition precedent to his demand of that sum, but only a mere liberty reserved to him. However we will look farther into the terms of the charter-party, and deliver our opinion upon that point another day. With respect to the quantum to be deducted on account of the freight made from Stockholm to London, should the plaintiffs be entitled to recover any thing, the amount may be settled out of Court.

PULLER
v.
STANIFORTH.

[*241]

The other Judges concurred in opinion with his Lordship upon the points decided by him : and the case stood over for consideration upon the last objection made by the *Attorney-General*. And two days afterwards,

PULLER LORD ELLENBOROUGH, Ch. J. delivered the opinion of the Court:
 v.
 STANFORTH. On hearing the argument on the rule for a new trial in this case before the Court on Saturday, the point upon which we then took time to consider was not one which had been urged at the trial, nor upon the motion to set aside the verdict, but was a point which suggested itself to the defendant's counsel in the course of the argument after the plaintiff's counsel had shewn cause against the rule. It *was this, that according to the terms of the charter-party Captain Flower was bound to come direct from Petersburg to this country, and to bring his outward cargo with him; that his doing so was a condition precedent, without performing which he could not claim the 2,500*l.* or any part of it; that his going into Stockholm, and disposing of part of his outward cargo there, was a breach of that condition; that he could therefore have no claim upon the plaintiffs in consequence of his not being permitted to take in a cargo at Petersburg; and consequently that the plaintiffs can have no demand upon the underwriters for an indemnity. It may be conceded, for the purpose of the present case, that the plaintiffs can have no demand upon the underwriters, if Captain Flower could have supported no claim against them; and it is therefore material to see whether Captain Flower could or could not have supported a claim against them. The parties foresaw when they entered into the charter-party, that circumstances might arise to prevent the shipping a return-cargo; and they therefore provided that the plaintiffs should be at liberty to detain the ship 40 running days after her arrival at St. Petersburg: and the plaintiffs covenant, that after the ship shall have remained the 40 running days without the outward cargo being unloaded, and consequently in all probability without the return cargo being put on board, Captain Flower should be at liberty to return to London or any other port in England; and also that they would pay him 2,500*l.* immediately on the ship's arrival in London or any other such port in England. There are therefore no words expressing it as a condition, that the ship should come direct to England, and with the whole of her outward cargo; and in the absence of such words, *is there any thing from which such a condition is either necessarily or fairly to be implied? Many

[*242]

[*243]

PULLER
v.
STANFORTH.

circumstances might occur to make it prudent and for the interest of all concerned, that the captain should touch at some port in his way home, should dispose of the outward cargo, and should get a freight home. Is such a construction then to be put upon the charter-party by implication, as to take away from him all power of availing himself of those circumstances. If he were to do it improperly, he would be answerable in damages for whatever injury his misconduct should occasion: so that justice would be done to the freighters, though this were not held a condition precedent; and the holding it to be a condition precedent might in the case I have just put be extremely prejudicial to them. Indeed if it were a condition precedent, the putting into a port for a single hour, or parting with a single pig of the lead, would be a breach, and would take away from the captain all right to his 2,500*l.*, although such act of the captain were in ever so slight a degree injurious to the interest of the freighters, and might be compensated by trifling damages: and so would any deviation, or disposal of the cargo be, however beneficial it might be to the freighters. As, however, the words do not import that this is a condition precedent; as the nature of the thing does not require that it should be so held; as great prejudice might result to the freighters from so holding, and as they will be entitled to indemnity for any damage, though it be not so held; we are of opinion that it is not to be deemed a condition precedent; that Captain Flower therefore is entitled to the 2,500*l.* from the plaintiffs; and that they are therefore entitled to recover it from the underwriters; subject to the deduction from that sum for the freight actually *earned by Captain Flower from Stockholm, as we before intimated when the cause was last before us.

[*244]

Postea to the plaintiffs.

1809.
May 15.

DOE, ON THE DEMISE OF JOSEPH TOFIELD, *v.*
ESTHER TOFIELD, WIDOW.†

(11 East, 246—256.)

[246]

Real property may pass under the description of “personal estates” in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the deviser’s intention. A surrender out of court to the use of his will made by the surrenderee of a copyhold before his admittance is absolutely void and of no effect, and cannot be made good by his subsequent admittance.

[*247]

THIS ejectment was brought by Joseph the brother and heir at law of William Tofield deceased, against Esther his widow and executrix, to recover the possession of certain premises at Stewkley in the county of Bucks, and of certain freehold and copyhold lands in the common fields of Stewkley parish. At the trial a verdict was found for the plaintiff, [subject to the opinion of this Court on a case, which stated (*inter alia*) that William Tofield] *on the 2nd of January 1804 made his will duly executed and attested, wherein, after giving pecuniary legacies to his brothers Joseph, Benjamin, and John, and to his sisters Mary and Elizabeth, he proceeds thus: I give and devise unto my father and mother William and Ann Tofield two tenements now occupied by H. Chandler and J. Coles, with the yard, &c. for and during the term of both or either of their natural lives; and from and after their decease I give and devise the said premises to my executrix herein also named. I also give and bequeath unto the trustees of the Methodist chapel in Stewkley, 30*l.* &c. I give unto my wife Esther Tofield all my stock of cattle, corn, hays, and grain, sheep, hogs, and cattle of all kinds, household goods and furniture, ready money, and securities of money, rights, credits, and personal estates whatsoever and wheresoever, subject nevertheless to the above legacies, to hold to the said Esther Tofield for and during the term of her natural life, provided she keep single; but and if she marry, she shall receive no profits or benefits from my estates whatso-

† Referred to as a leading authority and followed, by *MALINS, V.-C.* in *Lines v. Lines* (1870) 22 L. T. 400.—R. O.

ever, but at the time of her marriage shall resign up all my personal estates to the after-mentioned legatees in manner following; first, I give and bequeath unto my brother John Tofield the house and premises wherein I now dwell, with the closes adjoining, *and all the appurtenances thereunto belonging, with the tenements, to hold to him my said brother John Tofield, his heirs and assigns for ever: and the remaining of my personal estates I give and bequeath to my brother Joseph Tofield, my sister Elizabeth Ratlidge, and my sister Mary Capel, share and share alike, to hold to them their heirs and assigns for ever. But and if the said Esther Tofield shall remain single or unmarried, I hereby declare that she shall possess all my above-mentioned estates for and during the term of her natural life, and at her decease I give devise and bequeath my personal estates as above-mentioned; that is, to John Tofield my brother the house and premises wherein I now dwell, with the appurtenances thereunto belonging, to hold to him his heirs and assigns for ever; and the remaining of my personal estates I give and bequeath to my brothers Joseph and Benjamin, and my sisters Elizabeth and Mary equally share and share, to hold to them their heirs and assigns for ever. Lastly, I do appoint my said wife sole executrix, &c.

DOE dem.
TOFIELD
v.
TOFIELD.

[*248]

The question for the opinion of the Court was, whether the lessor of the plaintiff, as heir at law of the testator, were entitled to recover the freehold and copyhold estates of which the said testator died seised, or any and what part thereof.

This case was argued on a former day by *Peckwell* for the plaintiff, and *Best* for the defendant; when two questions were made; 1st, whether the widow took for life the residue of the testator's real property, not before specifically devised, under the description of personal estates. And if she did; 2ndly, whether certain copyhold would pass to which the testator had not been admitted at the time of his surrender to the use of his will. * * Upon the first point, it was urged by the plaintiff's counsel that no case had gone so far as to give effect to a devise of realty against the heir at law, where the testator had used the word "personal," importing in legal sense and common

[249]

DOE dem.
TOFIELD
v.
TOFIELD.

understanding the very reverse of "real" estate; although he admitted that if such a construction could be put on the word, it might be collected from the rest of the will that the testator had used it in that sense. But Lord ELLENBOROUGH, Ch. J. said, that if it distinctly appeared, as it did in this case, that the testator meant to pass his real property under that description, the Court must pronounce their opinion that it did pass according to such manifest intention. And the rest of the Court being clearly of the same opinion, no further argument was had on this point. But the Court took time to consider of their judgment on the other point. And now

LORD ELLENBOROUGH, Ch. J. delivered judgment:

This ejectment was brought for certain freehold and copyhold lands, which the lessor of the plaintiff claimed as heir at law to William Tofield, and the defendant claimed as his devisee. As to the freehold lands, the Court has had no doubt: the only question as to them was, whether they passed under the words "all my personal estates;" and it being clear beyond all possibility of doubt upon the face of the will, that the testator meant by these words (not what is ordinarily understood by them, but) such real property over which he had an absolute personal power of disposition and control, we have no *hesitation in saying that the freehold passed by this description.

[*250]

[The rest of the judgment relates to the question as to the copyholds, which is obsolete except as regards the effect of a will made before the 1st of January, 1838. See 1 Vict. c. 26, ss. 3, 34.—R. C.]

DE TASTET AND OTHERS *v.* BARING AND OTHERS.†
(11 East, 265—271: S. C. 2 Camp. 65—67.)

1809.
May 15.

[265]

A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from London on Lisbon, upon evidence that the enemy were in possession of Portugal when the bill became due, and Lisbon was then blockaded by a British squadron, and there was in fact no direct exchange between Lisbon and London, though bills had in some few instances been negotiated between them through Hamburg and America about that period; the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between Lisbon and London at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country.

THE plaintiffs declared that one J. Hodgson, on the 24th of November, 1806, at London, according to the custom of merchants, made his bill of exchange of the same date directed to Joza da Silva in Lisbon, being in Portugal beyond the seas, and required him at 12 months' date to pay to the order of the said J. Hodgson 2,220 mil 767 reis.‡ That Hodgson on the 27th of February, 1807, at London indorsed the said bill to Heinzelman and Rickarby, who indorsed to the defendants; and the defendants on the 7th of April, 1807, at London indorsed to the plaintiffs by their trading firm of Anthony Mangin; and the plaintiffs on the said 7th of April indorsed to Treves and Company. That the bill when due and payable on the 30th of November, 1807, at Lisbon was duly presented to Joza da Silva for payment, who refused so to do, and Treves and Co. caused it to be protested for non-payment; and it was returned to the plaintiffs as indorsers, and they were obliged to pay the sum therein contained, being of the value of 650*l.* sterling, together with exchange and re-exchange, interest, damages, costs and charges, &c. of all which the defendants had notice; and by reason of the premises, and according to the usage and custom of merchants, they became liable to pay to the plaintiffs the

† See now B. of E. Act, 1882, s. (1887) 36 Ch. D. 522, 527, 57 L. J. 57, and judgment of NORTH, J. in *Re Commercial Bank of South Australia* Ch. 131, 57 L. T. 395.—R. C.
‡ [Sic.]

DE TASTET
v.
BARING.
[*266]

said sum in the said bill or the value thereof, together with the exchange, re-exchange, &c. There was another set of counts, only charging that the defendants became liable *to pay the exchange, re-exchange, &c. without charging that the plaintiffs had been obliged to pay the same.

It appeared at the trial before Lord Ellenborough, Ch. J. at Guildhall, that the facts and dates of the several transactions corresponded with those stated in the first count of the declaration, except that it did not appear that the plaintiffs had in fact paid any re-exchange. It further appeared that the plaintiffs had purchased the bill in question of the defendants, and that when it was returned dishonoured, the defendants had offered to pay the principal, interest, and all expenses attending the dishonour, except the claim for re-exchange, (which was the only claim now in question; the rest having been paid into court;) and which claim they resisted on the ground, that at the time when the bill became due and was dishonoured the French were in possession of Portugal, and entered Lisbon on the 1st of December, 1807; which then and for some time before was actually blockaded by a British squadron at the mouth of the Tagus; and that there was not in fact any exchange existing at the time between Portugal and England, even if it could legally take place while the two countries were in a state of hostility. On the other hand, an instance or two were shewn of an exchange of bills about this time between the two countries, through the medium of other bills on Hamburg or America. Lord ELLENBOROUGH, Ch. J. told the jury, that if the plaintiffs had paid the re-exchange, or were in the common course of dealing liable to pay any, a verdict should be found for them, reserving the question of law, whether in the relative situation of the two countries at that period a charge for re-exchange could legally be demanded. The jury found a verdict for the defendants. On which the *Attorney-General* moved for a new trial, assuming

[*267]

the verdict *to have passed, not upon the ground that there was no exchange in fact between the two countries at the time, the contrary of which he considered to have been shewn in evidence; but that the jury had been led to suppose, by the course which the cause had taken, that the plaintiffs were not

entitled to the re-exchange, without proving that they had in fact paid it. This he contended was not necessary; but it was sufficient to entitle the plaintiffs to recover, if they were liable to pay the re-exchange to the holders of the bill at the time of the dishonour. And then the question of law, which had been reserved, would arise. A rule *nisi* having been obtained, Lord ELLENBOROUGH, Ch. J. now, on reporting the evidence, stated the manner in which he had left the case to the jury; which he observed was a special jury consisting of many eminent merchants conversant with the subject, and therefore he had encouraged them to take an active part in the examination of the witnesses; which they had done: and they had drawn their conclusion from the whole evidence in favour of the defendants against the claim of re-exchange.

DE TASTET
v.
BARING.

Garrow and *Marryat*, against the rule, said that at this period there was in fact no market at Lisbon for bills on London, and consequently there could be no re-exchange, the charge for which consisted of the sum which would have been paid in the Lisbon market for a bill drawn there on London of the same relative value as the dishonoured bill, supposing there had been any exchange at that time existing between the two countries. That in effect the same purpose was answered by the defendants having engaged to pay to the plaintiffs in London the actual loss sustained by them on the bill in consequence *of its having been dishonoured, which was the principal and interest and the amount of the charges of protesting and returning the bill; and they only resisted the payment of an arbitrary sum, which was said by some persons to be the charge of transmitting the money from Lisbon to London, through the medium of bills on Hamburg or America or Paris, when all direct exchange between Lisbon and London had then ceased. That the verdict of the jury was founded upon the fact that no such exchange existed between the two countries at the time; and that in point of law it could not exist, as the right to re-exchange in this case must be founded upon the right which persons in Lisbon then had to draw upon others in London, and the obligation of the subjects residing here to pay such bills; an obligation which

[*268]

DE TASTET
v.
BARING. could not exist during the continuance of hostilities between the two countries; and if it were illegal to do it directly, it must be equally illegal to do it indirectly, though the discovery of it might be more difficult in the latter case.

[*269]

The *Attorney-General* and *Littledale*, *contra*, said that at all times, and particularly in the present state of the commercial world, it would require grave consideration before it was laid down as a general rule, that no bill drawn from a foreign hostile country upon this could legally be paid here: it frequently happened that this was the only medium by which our own merchants abroad were able to remit their property home out of an enemy's country. A merchant in England might be indebted to a foreign merchant; and a British merchant, in a foreign country, invaded by the enemy, might make over property which he had upon the spot to that foreigner in exchange for his bill upon the British merchant *at home; and in these and the like cases no actual property is transmitted from this country to the enemy's country; for the money is paid to a subject at home, and the principal benefit of the transaction centers here. Then the nature of the transaction which gives rise to the question of exchange and re-exchange is this—A merchant in London draws on his debtor in Lisbon a bill in favour of another for so much in the currency of Portugal, for which he receives its corresponding value at the time in English currency; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the London market for bills on Lisbon, and the facility of obtaining them: the difference of that value constitutes the rate of exchange on Lisbon. The like circumstances and considerations take place at Lisbon, and constitute in like manner the rate of exchange on London. When the holder, therefore, of a London bill drawn on Lisbon is refused payment of it in Lisbon, the actual loss which he sustains is not the identical sum which he gave for the bill in London, but the amount of its contents if paid at Lisbon, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon London, which he is entitled to draw upon the persons there who are liable to him

upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for re-exchange. And it is quite immaterial whether or not he in fact re-draws such a bill on London and raises the money upon it in the Lisbon market; his loss by the dishonour of the London bill is exactly the same, and cannot depend on the circumstance whether he repay himself immediately by re-drawing for the amount of the former bill, with the addition of the charges upon it, including *the amount of the re-exchange, if unfavourable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here: but that party is at all events liable to him for the difference; for as soon as the bill was dishonoured, the holder was entitled to re-draw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market or exchange afterwards; for as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavourable to England before he re-drew; so neither could the party here fairly insist on having the advantage if the exchange happened to be more favourable when the bill was actually drawn. Where re-exchange has been recovered on the dishonour of a foreign bill, it has not been usual to prove that in fact another bill was re-drawn. If the quantum of damage is not to be ascertained by the existing rate of exchange at the time of the dishonour, the rule will become extremely complex for settling what is to be paid on the bill between different indorsees, each of whom takes it at the value of the exchange when he purchased it. If then the amount of the re-exchange between the two countries at the time of the dishonour be the true measure of damage which the holder at Lisbon was entitled to receive from his indorsee in England; and that re-exchange consist of the amount of a bill on London which would put the holder of the dishonoured bill in the same situation as if he had received the contents of it when due in Lisbon; it cannot make any difference whether the exchange between Lisbon and London at the time were carried on directly, or through the medium of other places. The more circuitous and difficult it was, *the greater would be the loss of the holder by the dishonour.

DE TASTET
v.
BARING.

[*270]

[*271]

ROE dem.
JOHNSON
c.
IRELAND.

[*282]

defendant it was insisted that the jury ought to presume that these, which were formerly copyhold premises, had been enfranchised by the Crown; and in support of such presumption the following evidence was given. First, The parliamentary survey in 1649, under the title of the manor of Westham. There were 3 columns of rents; one of freehold, another of copyhold, the 3rd of rents not ascertained; and in the column of freehold rents the churchwardens were marked 6d. rent. Receipts given by the steward of the manor from 1808 to 1805 were for quit rents. The style of these receipts was endeavoured to be accounted for by the steward, by saying that the discovery *of the premises being copyhold was made subsequent to those receipts, by finding the ancient Court rolls of the manor, from which the entries first mentioned were read, in the evidence-room of Lord Henniker, the late lessee of the Crown; the rentals at first given to the witness being without distinction of freehold or copyhold. And it was suggested that the compilers of the parliamentary survey might probably have been led into the same mistake if they could not get the Court rolls; and that so the mistake might have been continued down; and was the less likely to be discovered, because it did not occasion any diminution of the revenue of the Crown. Upon this evidence the learned Judge told the jury, that, considering all the circumstances, he saw no ground for their presuming an enfranchisement, inasmuch as it would be subversive of the maxim of the law, *nullum tempus occurrit regi*. This direction was objected to, upon a motion for a new trial made in the last Term, when the case of the *Mayor of Kingston-upon-Hull v. Horner*† was referred to, where a grant or charter was presumed against the Crown upon a possession of 350 years.

Garrow, Marryat, and Walford, in shewing cause against the rule, relied principally on the ancient Court rolls recently discovered, the existence of which was probably not known to the parliamentary commissioners; and if not, it would account for the mistake they had made in classing the 6d. rent under the head of freehold rents. The present steward had fallen into the

† Cowp. 102.

same mistake as his predecessors before the discovery of the Court rolls. Then the presumption of a grant of enfranchisement *was rebutted by the silence of the Court rolls and of the parochial church tablet in respect to any such enfranchisement; though the latter noticed the benefaction of these premises, as copyhold, by the surrender to the churchwardens. Next, they urged, that during all the time within which a grant from the Crown could be presumed to have been made, if at all, which was between 1636, when Newman surrendered the copyhold to the churchwardens, and 1649, the date of the parliamentary survey, the premises were out on lease, and could not have been enfranchised without the concurrence of the lessees. And, lastly, they asked to whom the grant of enfranchisement was to be presumed to have been made? Not to Newman, after his surrender of the copyhold to the churchwardens and their successors: and these latter could not take a grant of land to them and their successors.†

ROE dem.
JOHNSON
v.
IRELAND.
[*283]

(It was suggested that the grant might have been to the two first churchwardens and their heirs in trust for their successors, who had continued ever since in possession.)

The possession of the churchwardens was equally accounted for, whether the premises continued copyhold or were enfranchised.

The *Attorney-General*, *Shepherd*, *Serjt.* and *Pooley*, *contra*, were stopped by the Court.

LORD ELLENBOROUGH, Ch. J. :

The copyhold rent having been 6s. 6d., and no evidence that any other rent than 6d. had ever been paid for the premises in question, which are described to be freehold in the parliamentary *survey, it is impossible to say that this was not evidence to go to the jury that they were freehold: but their consideration of the question was excluded by the learned Judge, who told them

[*284]

† See 3 Bac. Abr. 377, tit. Grants, *in margine*, and 1 Bac. Abr. 601, tit. Churchwardens. And see also what

is said by Lord KENYON in *Withnell v. Gartham*, 3 R. R. 218, 219 (6 T. R. 396).

ROE dem.
JOHNSON
v.
IRELAND.

that they could not in this case presume a grant against the Crown. The parliamentary survey stands very high in estimation for accuracy: it has happened to me to know several instances in which the extreme and minute accuracy of the commissioners who drew it up has exceeded any thing which could have been expected. And when I find from thence that a freehold payment of 6*d.* was made for the premises in 1649, and there is no evidence of any other payment since that time: and when I find that there were persons existing between 1636 and 1649, (for the King continued in the exercise of his regal functions during the greater part of that time) competent to make an enfranchisement; I would presume any thing capable of being presumed in order to support an enjoyment for so long a period. As Lord KENYON once said on a similar occasion, that he would not only presume one, but one hundred grants, if necessary, to support such a long enjoyment. It is clear, therefore, that there ought to be another investigation of the case. And his Lordship, after consulting with the rest of the Court, added that the costs should abide the event.

Per CURIAM :

Rule absolute.

1809.
June 5.

[285]

MOWBRAY, ONE, &C., v. FLEMING.

(11 East, 285—287.)

An attorney, not having delivered any bill to his client before action brought; but having delivered a bill of particulars of his demand under a Judge's order after action brought; is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of the stat. 2 Geo. II. c. 23, s. 23,† requiring a bill to be delivered a month before the action brought.

THIS action was brought by an attorney, to recover the amount of certain charges for business done and money paid for the defendant. There was no bill delivered a month before the action brought, as is required by the stat. 2 Geo. II. c. 23, s. 23, before an attorney can “maintain any action or suit for the

† See now 6 & 7 Vict. c. 73, s. 37, question, seem essentially different. —R. C.

recovery of any fees, charges, or disbursements at law or in equity;" and which bill, the statute says, upon application of the party to the Court, &c. "in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted," is to be taxed. But after the action brought, a bill of particulars of the plaintiff's demand was delivered by him under a Judge's order, containing, amongst several other items, for attendances on the defendant and writing letters, which it was admitted were not in themselves taxable, this item; "To attendances with you both by myself and clerk on Mr. Touse in the city, respecting a suit at law commenced against your brother Rd. Fleming; when, after consulting counsel, and after several other attendances and letters, the business was adjusted to your satisfaction, 2*l.* 2*s.*" The last item was this—"To cash paid by me for the stage-hire of your son down to Chertsey and back to London, agreeable to your request, 8*s.*" It was objected at the trial before Heath, J. on the Home Circuit, that the item first specified was for business done by the plaintiff as an attorney in the course of a cause in Court, which was taxable, and therefore that the whole bill was taxable; and being so, no action could be maintained for the *amount, without complying with the requisition of the statute; and the learned Judge being of that opinion, nonsuited the plaintiff. This nonsuit was moved in the last Term to be set aside, on the ground that the item in question was not taxable, as not relating to any cause in which the defendant himself was concerned, or for any thing done in Court in the course of that suit. And at any rate that the plaintiff was entitled to recover for the last item in the bill of particulars, which had no manner of relation to the business of an attorney.

MOWBRAY,
ONE, &c.
v.
FLEMING.

[*286]

Best, Serjt. now shewed cause, and was going to refer to cases† to shew that if there were one taxable item in the bill,

† Vide *Hill, one, &c. v. Humphreys*, 2 Bos. & P. 343, where other cases are collected, all of which were referred to on moving for the rule. And vide also *Benton v. Garcia*, Kingston Lent Assizes, 1800, 3 Esp. N. P. Cas. 149; where HEATH, J.

held that the attorney's demand could not be severed, though no bill were delivered by him before the action brought. But there the whole demand was connected with the plaintiff's character of an attorney.

MOWBRAY,
ONE, &c.
v.
FLEMING.

the whole bill was taxable: but the Court said that he need not labour that point, but proceed to shew that there was any one taxable item in the plaintiff's bill: on which he rested on the first mentioned item; and cited *Winter v. Payne*,† where items for "attending and taking instructions to commence an action; drawing and engrossing affidavit of debt; attending the party to be sworn," &c. were considered as business done in Court.

(Lord ELLENBOROUGH observed that that was a proceeding in Court.)

[*287]

Here there was a consultation with immediate reference to a cause in Court; and it is enough that there be a cause existing, and that the business be done with reference to that cause. This has always *been considered as a very beneficial statute, and fit to be extended as far as the words will warrant: and the present case comes within the reason and the words of it.

BAYLEY, J. asked what he had to say, why the plaintiff might not recover the amount of the last item, for cash paid by the plaintiff for the stage-hire of the defendant's son, which had no manner of reference to the business of an attorney. To which *Best* replied that in *Hill v. Humphreys*; Lord ELDON had considered that an attorney would not be entitled to recover such items mixed with others in a taxable bill, if the statute were not complied with.

LORD ELLENBOROUGH, Ch. J.:

What was there said by Lord ELDON was with reference to a case where an attorney had delivered a bill including taxable items: but this is not the case of a bill delivered, as an attorney, but an account of the plaintiff's whole demand against the defendant obtained under a Judge's order, as in any other case.

All the Court agreed in respect to the last item; and some of the Judges doubted whether the first item were to be considered as any thing more than an attendance by the defendant's

† 6 T. R. 645.

‡ 2 Bos. & P. 343.

desire for the purpose of compromising the suit against his brother.

MOWBRAY,
ONE, &c.
v.
FLEMING.

Rule absolute.

Garrow and Nolan were to have supported the rule.

DENNE, ON THE DEMISE OF BOWYER, v. JUDGE.

(11 East, 288—289.)

1809.
June 5.

[288]

Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as executors, but as devisees in trust and joint tenants. And at any rate the case is not helped by the stat. 21 Hen. VIII. c. 4, so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint tenancy, and convey 3-5ths of the estate, to be held in common with the two remaining parts.

In ejectment brought for a messuage at Maidstone, the lessor of the plaintiff derived title under the will of T. Smith, dated the 15th of March, 1806, by which he devised his real property to five trustees named, in trust to sell the same, and apply the purchase-money to certain uses. He also gave specific legacies, disposed of the residue, and made the same persons executors of his will, whom he had before appointed trustees of the real estate for the purpose of sale. Deeds of lease and release to the lessor of the plaintiff were then produced by him, appearing upon the face of them to have been duly executed by all the five trustees, but the execution of three of them only was in fact proved. On the part of the defendant it was insisted that this was a defective conveyance, and proved no title in the lessor to any part of the property. But the Chief Baron was of opinion that some estate at least passed to the releasee; either the whole, or 3-5ths, by severance of the joint estate, to be held in common with the two remaining parts: and therefore he directed the jury to find a general verdict for the plaintiff, which might be confirmed, or modified, or a nonsuit entered, as the Court thought proper. A rule *nisi* having been obtained for entering a nonsuit, or confining the verdict to 3-5ths;

DENNE dem.
BOWYER
c.
JUDGE.

[*289]

Best, Serjt. and *Roberts*, shewed cause against the rule ; endeavouring at first to sustain the verdict for the whole under the stat. 21 Hen. VIII. c. 4, which enacts, that where part of the executors, named in a will directing a sale of *lands by executors, refuse to act, and the residue accept the charge, all bargains and sales of such lands by the acting executors shall be as good as if all the others refusing to administer had joined with them. And they referred to Co. Lit. 113 a, and *Bonifaut v. Greenfield*,† where the case was this ; one devised lands to J. S. and three others and their heirs, to sell and apply the money to the performance of his will ; and appointed the four his executors ; one of whom refusing to meddle, the other three sold the land : and such sale was held good either by the common law or the statute. For when he devised the land to four to sell, and afterwards made them his executors, it was tantamount to devising at first that such his executors should sell.

LORD ELLENBOROUGH, Ch. J. :

The statute was passed to remedy the inconvenience where some of the executors refuse to act : but here there was no such refusal : so far from refusing to act, they have all apparently concurred in the conveyance, though there was a defect of proof as to the execution of two of them. Besides, here the estate was not devised to them as executors to be sold, but as devisees ; though they were also appointed executors. They had nothing to do with the land as executors. If indeed the fund, when raised, had been distributable by them in that character, that might have brought the case within the rule contended for.

Lawes, for the defendant, admitting that the plaintiff was entitled to enter his verdict for 3-5ths, it was ordered by the COURT accordingly.

† Cro. Eliz. 80.

LAW *v.* HODSON.†

(11 East, 300—301; S. C. 2 Camp. 147—149.)

1809.
June 6.

[300]

The st. 17 Geo. III. c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them.

THIS was an action of assumpsit to recover the value of a quantity of bricks which had been sold and delivered by the plaintiff to the defendant. An objection was taken at the trial that the bricks were made of less dimensions than is required by the stat. 17 Geo. III. c. 42, which after reciting "that inconveniences had arisen to the public by frauds committed in lessening the size of bricks under their usual proportion, without any diminution of price; for remedy thereof, and for the common good and benefit of the subject," enacts, that all bricks made for sale shall be of certain dimensions therein specified: and then gives a penalty, on conviction, of 20s. per thousand for the breach of this regulation. It appeared in evidence, that the bricks in question had been seen by the plaintiff, and selected by him out of a larger quantity, some of which had been rejected by him for other defects, but no notice had been taken of the size; and the bricks were afterwards received and used by the defendant. But Lord ELLENBOROUGH, Ch. J. being of opinion, that the making and selling of such bricks was a fraud upon the statute, nonsuited the plaintiff.

Garrow now moved to set aside the nonsuit, on the ground that, however the breach of this law might have been a reason for the defendant's rescinding the contract, and returning the bricks when he discovered them to be under the statutable dimensions, yet having accepted and actually converted them to his own use, the contract was executed, and the vendee was at all events liable to *pay the actual value of the goods. That the Legislature had not avoided the contract itself, but only

[*301]

† Cited by BOWEN, L. J. and followed, in *Mellis v. Shirley Local Board* (1885) 16 Q. B. D. 446, 454, 58 L. J. Q. B. 143, 53 L. T. 810.—R. C.

LAW
v.
HODSON.

subjected the brickmaker to a penalty, which was also limited to be sued for within a month.

LORD ELLENBOROUGH, Ch. J. :

This was a fraud upon the buyer, whom the Legislature meant to protect. He gave credit to the maker at the time that the bricks were of the statutable size, and they turned out to be all under that size.

GROSE, J. :

The Legislature has prohibited the general sale of bricks which are under size.

LE BLANC, J. :

It did not appear that the defendant bought the bricks, knowing them to be under size.

BAYLEY, J. :

The policy of the Act was to protect the buyer† against the fraud of the seller, and this can only be done by holding that the latter shall not recover the value of such bricks so sold.

Rule refused.

1809.
June 10.

THE KING v. THE INHABITANTS OF THE PARISH OF BRIDEKIRK IN CUMBERLAND.

(11 East, 304—306.)

To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into 7 townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of G. B. &c.; and that the residue, &c. was within the township of L. B. &c. and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying what part of the highway lay within one township, and what part within the other.

THIS was an indictment for the non-repair of a common highway within the parish; which, after stating the termini of the high-

† Vide *Johnson v. Hudson*, ante, p. 465, and note this distinction.

way, charged that a certain part of the same highway between such and such places (describing them with the length and breadth,) on the first of June, 1807, &c. was out of repair, &c.: and then it alleged *that the inhabitants of the parish of Bridekirk were immemorially bound to repair the said highway. The defendants pleaded, that the parish of Bridekirk from time immemorial was divided into seven townships (naming them,) and that the inhabitants of the said several townships respectively from time immemorial have repaired, independent of each other, when necessary, such and so many of the several and respective ancient common King's highways respectively situated within the said respective townships as would otherwise be repairable by the inhabitants of the said parish at large. That part of the said part of the said King's common highway in the indictment specified, and thereby supposed to be ruinous, now is, and during all the time in the indictment mentioned hath been situate in the said township of Great Broughton in the said parish, and during all that time was and still is a King's common highway, which but for the said prescription or usage would have been and would be repairable by the inhabitants of the said parish at large: and that the residue of the said part of the said King's common highway in the said indictment specified, &c. is, and during all the time, &c. hath been situate within the said township of Little Broughton in the said parish, &c. And by reason of the premises the inhabitants of the said parish at large ought not to be charged with the repairing the said part, &c. of the highway in the indictment specified; but the respective parts thereof, situate in the said respective townships of Great Broughton and Little Broughton, ought to have been and still ought to be repaired by the respective inhabitants of these respective townships independent of the rest of the inhabitants of the said parish, &c. To this there was a special demurrer, because the plea did not set forth or distinguish what part of the highway alleged *to be ruinous lies within the township of Great Broughton, and what part within the township of Little Broughton.

THE KING
v.
THE INHABI-
TANTS OF
BRIDEKIRK.

[*305]

[*306]

Holroyd argued in support of the demurrer, that the inhabitants of the parish at large, being liable at common law to the

THE KING
v.
THE INHABITANTS OF
BRIDEKIRK.

repair of all highways within it, could only discharge themselves by shewing with certainty on whom the burthen lay, and in what right. For which he cited *Rex v. Sheffield*,† *Rex v. Penderryn*,‡ and *Rex v. Great Broughton*.§ The plea therefore should have stated that such a part of the highway, specifying it, was situate within the township of Great Broughton, the inhabitants of which township were immemorially bound to repair it: and that such other part, specifying it (or the residue of the highway stated in the indictment), was situate within the township of Little Broughton, and that the inhabitants of that township were immemorially bound to repair such other part.

The Court were decidedly of opinion, that this objection was well founded. That the parishioners must necessarily know the limits of the several townships within it; and were bound to shew with certainty the parties who were liable to repair every part of the highway indicted, and in what right they were so bound. But the Court offered to give *Littledale*, who was counsel for the defendants, leave to amend before argument; which he accepted.

1809.
April 22.

THE KING v. TEAL AND OTHERS.

(11 East, 307—312.)

[307]

All the defendants convicted upon an indictment for a conspiracy (which has been removed by *certiorari* into the King's Bench) must be present in court when a motion for a new trial is made on behalf of any of them.

THIS was an indictment against Thomas Teal, Hannah Stringer, G. Etherington, and Sarah Cumberland, for conspiring falsely to charge the prosecutor with being the father of a bastard child born on the body of Hannah Stringer, which indictment had been removed by writ of *certiorari*, at the instance of the defendants, into this Court. Before the trial a *noli prosequi* was entered as to Hannah Stringer; and at the last York assizes Teal and Cumberland were convicted upon four

† 1 R. R. 442 (2 T. R. 106). ‡ 2 T. R. 513. § 5 Burr. 2700.

counts of the indictment, and Etherington was acquitted. On the fourth day of the last Term Teal appeared personally in Court, and *Cockell*, Serjt. on his behalf moved for a new trial, on the ground that improper evidence had been admitted on the part of the prosecution, and that other evidence tendered on the defendant's part had been improperly rejected.

THE KING
v.
TEAL
and Others.

The COURT inquired if all the defendants who had been convicted were then in Court ; and being informed that Sarah Cumberland was not present, they said they could not entertain a motion for a new trial in her absence, of which, if granted, she must also have the benefit ; because if such a precedent were once established, the person most criminal might keep out of the way, and take the opinion of the Court by putting forward one of the other defendants who had been convicted. They also inquired if the defendants had defended separately at the trial, which was answered in the negative ; but *Cockell*, Serjt. added, that he was now only instructed by the defendant *Teal, and that his client had no control over Sarah Cumberland, and could not compel her attendance : and it would be very hard for him in a case where there was no pretence of any collusion, to be deprived of the opportunity of moving for a new trial by her absenting herself. But the COURT said that they could not permit the motion to be made, unless all the defendants appeared, or a special and separate ground were laid before them, for dispensing with the general rule. But they said they would bear in mind what passed now when the defendants were brought up for judgment. And the prosecutor not moving for Teal's commitment, he was not committed into custody.

[*308]

Afterwards, on the 6th of May, Teal and Cumberland being present in Court, Mr. Justice LAWRENCE's report of the evidence on the trial was read ; and *Cockell*, Serjt. would then again have moved for a new trial : but the COURT said that the four days being now expired, he was not entitled to make such a motion ; though they would hear any arguments which he had to suggest upon the report, in order to satisfy them in the performance of their own duty, that justice had not been done upon the trial : and if they were of opinion, on hearing those arguments, and consider-

THE KING
v.
TEAL
and Others.

ing the learned Judge's report, that there ought to be a new trial, they would of their own accord award it. And they referred to *The King v. Holt*, 5 T. R. 486, and to *The King v. Atkinson*, there cited. The defendant's counsel accordingly stated the grounds upon which he impeached the former trial, and the Court said they would consider of them; and in the mean time the Court committed the defendants to the custody of the marshal, without making any rule for a new trial.

[309]

And now in this Term Lord ELLENBOROUGH, Ch. J. said that the Court had considered the objections which had been made to the trial, and though not in the form of a motion for a new trial, yet with the same benefit to the parties concerned: and they were of opinion that there was no foundation for either of them. After this, affidavits in mitigation were put in by the defendant's counsel and read, and the defendants were directed to be brought up for judgment on Monday, the 19th of June, when the Court, taking into consideration the imprisonment they had already suffered, and the expenses of the prosecution, sentenced Teal to six months, and Cumberland to two months imprisonment in York Gaol.

[The rest of the report is occupied with the particular objections which turned upon the now obsolete law as to the competency of a witness.]

1809.
June 13.

CORMACK v. GLADSTONE.

(11 East, 347—349.)

[347]

A ship from Stockholm to New York was by the course of the voyage to touch at Elsinour for convoy, and to pay the Sound dues: and the owner of sheep on board took in a short stock of provender for them at Stockholm, and laid in the rest at Elsinour before the Sound dues could be paid: held that the voyage not being thereby delayed, though the occurrence was foreseen and intended, the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea.

THIS was an action on a policy of insurance on the ship *Bess*, valued at 1,200*l.*, and on the captain's books, clothes and instruments, valued 100*l.*, "at and from Stockholm to New York." The interest in the ship was alleged and proved to be in the

Earl of Selkirk, and the interest in the books, clothes and instruments, in the captain. The loss was alleged to be by the perils of the sea. At the trial before Lord Ellenborough, Ch. J. at Guildhall a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

CORMACK
v.
GLADSTONE

In August, 1808, the ship *Bess*, being at Stockholm, took in a cargo of 62 live sheep to be carried on the voyage insured, and sailed from thence on the 14th of that month. An agent of Lord Selkirk sailed in the vessel to take care of the sheep. Understanding that the vessel was to touch at Elsinour he did not take in sufficient provender for the sheep at Stockholm for the voyage to New York. The ship in the regular course of her voyage touches for convoy, and to pay the Sound dues, at Elsinour, where sufficient provender was taken on board for the voyage; but the ship was not thereby delayed at all in her course; the whole additional provender being on board before the Sound dues could be paid. In all other respects the ship had sufficient water and provisions for the voyage from Stockholm to New York. The ship proceeded immediately under convoy from Elsinour on the voyage insured, but was lost by the perils of the sea. If the Court should be of opinion that the plaintiff was not entitled to recover, a *nonsuit was to be entered: if he were so entitled, the verdict was to stand.

[*318]

Scarlett for the defendant, having been called upon by the Court to begin, attempted to distinguish this from the case of *Raine v. Bell*; † because there the ship had been originally fitted out with every necessary for the voyage which could be procured at her lading port, and it was unavoidable necessity within the perils insured against which compelled her to put into another port during the voyage. But here it appears that the vessel left her lading port without a sufficient stock of provender for the sheep, which she might have laid in there; and therefore she sailed with a necessity imposed upon herself of stopping somewhere in the progress of her voyage to get more; and if she had not found an adequate stock at Elsinour, she must have touched at some other place to obtain it. In *Delany v. Stoddart* ‡ there

† 9 R. R. 533 (9 East, 195).

‡ 1 R. R. 139 (1 T. R. 22).

CORMACK
v.
GLADSTONE. was a usage of the trade to protect the taking in an additional cargo at the place into which the ship was driven by stress of weather ; without which it would have been considered as a deviation. But here there was no such usage, and the underwriters could not calculate upon the ship going into Elsinour for such a purpose.

LORD ELLENBOROUGH, Ch. J. :

The not taking in sufficient provender for the sheep at Stockholm for the whole voyage is not like neglecting to take a sufficient crew, or tackling, or other necessary relating to the equipment or navigation of the ship ; but this omission only affected the safety of the cargo of sheep : and while the vessel was
[*349] *staying for other necessary purposes at Elsinour, the provender was laid in without any delay of the voyage ; which brings the case within the principle of the former decision.

GROSE, J. agreed.

LE BLANC, J. :

The vessel left Stockholm with the foreknowledge of the agent that she must go into Elsinour for other purposes, in the regular course of her voyage, when he might complete his stock of provender during the performance of those other purposes.

BAYLEY, J. :

It does not follow that the master might or would have gone elsewhere for provender, if he could not have procured it at Elsinour without delaying the voyage. The sheep might have been thrown overboard.

Postea to the plaintiff.

Puller was to have argued for the plaintiff.

PARKER v. STANILAND.†

(11 East, 362—366.)

1809.
June 18.

[362]

A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground immediately; is not a contract for any interest in land within the 4th section of the Statute of Frauds, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse from whence they were to be removed by the defendant.

THE plaintiff declared that the defendant was, on the 1st of January, 1809, indebted to him in 500*l.* for a certain crop of potatoes of the plaintiff before that time bargained and sold by the plaintiff to the defendant at his request, and by the defendant under that bargain and sale before that time accepted, gathered, dug up, taken, and carried away: and being so indebted the defendant promised to pay, &c. There was another similar count on a *quantum meruit*, and other general counts for goods sold and delivered, &c. The defendant pleaded the general issue, and paid 22*l.* 1*s.* 9*d.* into Court. It appeared at the trial before Bayley, J. at Nottingham, that the plaintiff, being the owner of a close of about two acres, which was cropped with potatoes, agreed with the defendant on the 21st of November, to sell him the potatoes at 4*s.* 6*d.* a sack. The defendant was to get them himself, and to get them immediately. The defendant employed men to dig the potatoes on the 25th, 26th, and 27th of the same month, and got 21, 24 and 33 sacks full, and on the 4th of December he *got seven sacks more, and 14 about Lady-day, the value of which was covered by the money paid into court. But there remained about three roods of potatoes which were not dug up, and which were spoilt by the frost; and the action was brought to recover the value of these. The objection taken at the trial was, that this was an agreement for an

[*363]

† Followed in *Warwick v. Bruce* (1813) 2 M. & S. 205, and *Jones v. Flint* (1839) 10 A. & E. 754. *Quære* whether these cases overrule upon the point here in question the judgment of the Common Pleas delivered

by Sir J. MANSFIELD in *Emmerson v. Heelis* (1809) 2 Taunt. 38 (reported in 11 R. R.). See the cases discussed in *Blackburn on Sale*. Also see *Marshall v. Green* (1875) 1 C. P. D. 35, 45 L. J. C. P. 153.—R. C.

PARKER interest in land, which, not having been reduced to writing,
STANILAND. ^{v.} was void by the Statute of Frauds, 29 Car. II. c. 3, s. 4. But the learned Judge over-ruled the objection, and permitted the plaintiff to take a verdict for the amount; reserving leave to the defendant to move to enter a nonsuit, if the Court should think the objection well founded. The motion was accordingly made by

Balguy, jun. in the last Term, who referred to *Crosby v. Wadsworth*,† where a contract for the purchase of a growing crop of grass in a close, for the purpose of being mown and made into hay by the vendee, was held to convey to him an interest in the land itself, and therefore avoided by the statute, if not reduced into writing.

Lord ELLENBOROUGH, Ch. J. observed that there was this difference between the cases, that in *Crosby v. Wadsworth* the contract was made while the grass was then in a growing state, which was afterwards to be mown at maturity, and made into hay. Whereas here the contract was for the potatoes in a matured state of growth, which were then ready to be taken, and were agreed to be taken immediately. There was a delivery of the whole at the time, as much as the subject matter was then capable of delivery, and the defendant did actually take away a great part of them. However a rule *nisi* was granted [*364] for further consideration of this point. But with respect *to another objection which was now started, that the money paid into Court covered the value of all the potatoes which had been taken, and that the remainder, which were left in the plaintiff's ground, could not be recovered in value under counts, stating that they had been "bargained and sold, gathered, dug up, taken, and carried away," or "sold and delivered:" his Lordship answered, that the objection had not been taken at the trial; and that, besides, it was enough to prove that they were bargained and sold, without proving that they were taken away.

Clarke and *Hemming* now shewed cause against the rule,

† 8 R. B. 566 (6 East, 602).

and contended that the potatoes were sold merely as goods in a warehouse ready for delivery at the time and to be taken immediately, though they were permitted to remain there till it suited the defendant's convenience to remove them. Potatoes are often kept in the ground.

PARKER
v.
STANILAND.

(GROSE, J.: That is after they have been severed.)

All benefit to them from the soil was at an end, nor was it contemplated by the contracting parties. This differs the case materially from *Waddington v. Bristow*,† and *Crosby v. Wadsworth*,‡ where the continuing growth and nourishment of the hops in the one case, and of the grass in the other, were in contemplation. The right to the soil continued all the time in the plaintiff, and the defendant would have been a trespasser if he had meddled with it otherwise than for the special purpose of taking up the potatoes. The nature of the contract shews this; for the contract was merely for the potatoes, and they were to be sold by the sack. The defendant could not have maintained trespass against any person going on the ground: he himself had only an easement to take the crop.

Balguy, and *Balguy*, jun. in support of the rule, contended that if the land had been devised in this state, the devisee would have taken the potatoes against the executor; which shews that the contract was for an interest in the land. Nor can this be distinguished in principle from *Crosby v. Wadsworth*, upon the presumption (probably not founded in fact) that the potatoes had done growing and had ceased to derive any nourishment from the land: but it is enough that they were not severed from it when the contract was made, and therefore did not exist separately as goods: that is the only distinction recognized in the books. Larceny could not have been committed of them. This case is even stronger in one respect; for the crop could not be taken up without breaking the soil, which was to be done by the defendant; and therefore it cannot be considered as a mere easement. The defendant was entitled to the possession of the

[365]

† 2 Bos. & P. 452.

‡ 8 B. R. 566 (6 East, 602).

PARKER v. STANILAND. close until the crop was taken; for without that the contract could not have been executed; and therefore he must have been entitled to all the possessory remedies against a wrong-doer invading his possession.

LORD ELLENBOROUGH, Ch. J. :

[*366]

It does not follow that because the potatoes were not at the time of the contract in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land within the 4th section of the Statute of Frauds. The contract here was confined to the sale of the potatoes, and nothing else was in the contemplation of the parties. It is probable that in the course of nature the vegetation was at an end: but be that as it may, they were to be taken by the defendant immediately, *and it was quite accidental if they derived any further advantage from being in the land. This differs the present case from those which have been cited. The lessee *primæ vesturæ* may maintain trespass *quare clausum fregit*, or ejectment for injuries to his possessory right: but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil. I am not disposed to extend the case of *Crosby v. Wadsworth* further, so as to bring such a contract as this within the Statute of Frauds, as passing an interest in land.

GROSE and LE BLANC, Justices, agreed.

BAYLEY, J. :

I do not think that this contract passed an interest in the land within the meaning of the 4th section of the Statute of Frauds. In the cases of *Crosby v. Wadsworth*, and *Waddington v. Bristow*, the contracts were made for the growing crops of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land while the crops were

growing to maturity before they were gathered: but here the land was considered as a mere warehouse for the potatoes till the defendant could remove them, which he was to do immediately; and therefore I do not think that the case is within the statute.

PARKER
v.
STANILAND.

Rule discharged.

OLIVER v. COLLINGS.

(11 East, 367—370.)

1809.
June 14.

[367]

Arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority. The defendant having objected to this appointment, because of partiality, the arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attorneys agreed on a third person. The umpire objected to was then called on by the plaintiff's attorney to proceed, and made his award within time. Held, that the award was good.

GASELEE moved to make a rule absolute for an attachment for non-performance of an award which had been made a rule of Court.

East opposed it, on an affidavit, that by the bonds of submission Rowe and Stephens were appointed joint arbitrators, with a power to appoint an umpire, if they could not agree. That the arbitrators not agreeing, first appointed Hambly as umpire; who declining to act, they next appointed Grigg within the time limited. That as soon as Grigg's appointment was made known to the defendant's attorney, he objected to it on the ground of Grigg's being upon bad terms with the defendant, and therefore an improper umpire; to which the arbitrators assenting, each of them proposed a different person; and not agreeing upon either, the plaintiff's and defendant's attorneys met, and the former named a new person as umpire, which was acceded to by the latter; but (no further appointment having been made by the two arbitrators,) the plaintiff's attorney called on Grigg, before the time was out, to proceed with his umpirage; and then an appointment of him on stamp

OLIVER
v.
COLLINGS.

[*368]

was signed by Rowe and tendered to Stephens, who refused to execute it; notwithstanding which Grigg made his award on the 30th of January, 1808, within time, after notice given to him on the morning of that day by the defendant's attorney that his appointment had been objected to and *was agreed to be revoked. He therefore contended that, under these circumstances, the Court would not by granting this attachment preclude the defendant from disputing the authority of the umpire in an action by the plaintiff on the submission bond, if he meant to insist upon the award. That by the general rule any power given to another may be revoked before execution; and here the arbitrators who had power to appoint an umpire, and had once appointed Grigg, had agreed to revoke that appointment before Grigg had executed the umpirage, though they had not agreed in any new appointment; and that revocation was confirmed by the attornies for both parties, who had as far as lay in their power agreed to substitute another. That Grigg having been appointed umpire by parol, his appointment might be revoked by parol before execution of his power. That though it was now too late for the defendant to move to set aside the award on the merits, or to impeach it on the ground of partiality or prejudice in the umpire; yet the Court had before refused attachments in cases where an objection to the award appeared upon the face of it, even after the time limited by the statute was out, for moving to set aside the award; because they would not preclude the party grieved from availing himself of the objection if an action were brought against him upon his submission bond for non-performance of the award. So here, for the same reason, where there is a serious question of law to try, and where there seems such probable ground for suspecting the justice of the award, the Court will not lend its summary assistance, but leave the plaintiff to bring his action, which will let the defendant in to insist on the nullity of the umpirage.

[*369]

† Vide *Trippet v. Eyre*, 3 Lev. 263, and 2 Ventr. 113, and *Reynolds v. Gray*, 1 Salk. 70; 1 Ld. Ray. 222, and 12 Mod. 120. And *vide* the reasoning on these cases in Kyd on

Awards, 91, &c. It seems that the refusal of one umpire to accept the appointment does not preclude the arbitrators from naming another within time.

having once executed their power in the appointment of an umpire, could afterwards appoint another : but supposing they could not, the objection would equally apply to the appointment of Grigg.

OLIVER
v.
COLLINGS.

(LE BLANC, J. said, that the defendant ought to have applied in time† to set aside the award upon the special circumstances of the case : and the Court would not, after the laches of the defendant, drive the plaintiff to his action merely to try a doubtful question of law, supposing this to be so.)

To which it was answered, that the Court would not grant an attachment to enforce an illegal award, if no action could be maintained upon it.

LORD ELLENBOROUGH, Ch. J. :

We have lately held that if an authority be once executed, it cannot be executed again.‡ Here the arbitrators had executed their authority by an effectual appointment of an umpire, who accepted and acted upon the authority so conferred on him : the consent or dissent of the parties themselves afterwards to such appointment signifies nothing.§ So the subsequent tender of that appointment on stamp to one of the arbitrators was merely to serve as formal evidence of it. The arbitrators afterwards, in compliance with the wishes of the *defendant, made an ineffectual attempt to appoint another umpire in the place of him they had appointed before ; but they could not agree on the person to be substituted, and therefore the original appointment stood as before.

[*370]

Per CURIAM :

Rule absolute.

† This was prevented at the time it was intended by the illness of the defendant.

‡ Vide *Irvine v. Elton*, 8 East, 54.

§ Nor can even a parol agreement

between parties to abandon an award made under bonds of submission be pleaded to an action on the bond. *Braddick v. Thompson*, 8 East, 344.

1790.
Middlesex
Sittings.

RUGBY CHARITY v. MERRYWEATHER.†

(11 East, 375, n.—376, n.)

Dedication of a street to the public may be presumed from eight years' uninterrupted user. A public street need not be open at both ends.

[This case is reported in 11 East, 375, 376, in a note to *Daniel v. North*, a case which was itself decided upon a point now become unimportant by reason of the Prescription Act, 2 & 3 W. IV. c. 71, s. 3.—R. C.]

[375, n.]

ACTION of trespass brought by the trustees of the Rugby Charity against Merryweather, at the Sittings in Middlesex, on the 26th of May, 1790, to try a right of way in dispute between the plaintiffs and the governors of the Foundling Hospital. There were several pleas of justification on the record, amongst others, one stating that the *locus in quo* (which was Lamb's Conduit Street) was a common highway, and that the supposed trespass was committed in removing an obstruction there. The evidence was, that the right of the soil was clearly in the plaintiffs; but there had been a common street there, though no thoroughfare, by reason of the houses at the end, for above 50 years. The plaintiffs accounted for not having put up a bar or the like, to denote that the way was not relinquished to the public at large, by shewing that the *locus in quo* had been in lease for a long term up to the year 1780.

Lord KENYON, Ch. J. asked what the plaintiffs had to say to the time from 1780 till about two years ago, when they had put up a bar. In answer it was said that they had been in treaty with the Foundling Hospital, respecting the allowing them a right of way, which was finally broken off.

Per Lord KENYON :

If this rested solely on the ground of a question of right between the plaintiffs and the Foundling Hospital, the former would certainly not have been barred by the time which elapsed

† See this case commented on in the judgments of the Common Pleas in *Woodyer v. Hadden* (1813) 5 Taunt. 125, and of the King's Bench in *Wood*

v. Veal (1822) 5 B. & Ald. 454. Also in *Bourke v. Davis* (1889) 44 Ch. D. 123, 62 L. T. 34; see also *Bailey v. Jamieson* (1876) 1 C. P. D. 329.—R. C.

from 1780 till the obstruction was put up, pending the treaty between them: but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever; and therefore it is now too late to assert the right: for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient. And as to this not being a thoroughfare; that can make no difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers. The Duke of Bedford preserves his right in Southampton Street, Covent Garden, by a bar set across the street, which is shut at pleasure, and shews the limited right of the public.

RUGBY
CHARITY
v.
MERRYWEA-
THER.

The jury found a verdict for the defendant upon the issue on the common highway.

DOE, ON THE DEMISE OF TERRY, v. COLLIER.

(11 East, 377—380.)

1809.
June 15.

[377]

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife and the overplus to his nephews; and after his wife's death to the use of his nephews and the survivor for their lives; remainder, to the use of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee. Held that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee.

In ejectment for certain messuages and lands at Swanscombe in Kent, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

Henry Peers, clerk, being seised in fee of the premises in question, consisting of three undivided fourth-parts of two houses, farms, and woodlands, at Swanscombe, by his will of the 27th of January, 1787, devised "all and every of my messuages,

DOE,
on the demise
of TERRY,
v.
COLLIER.

[*378]

lands, tenements, and hereditaments, or part and parcel of lands, &c. at Swanscombe, to Henry Vyvyan, clerk, and his heirs, in trust to and for the several uses intents and purposes after mentioned; viz. that the said H. Vyvyan, his heirs, &c. shall out of the rents and profits pay to my wife, Elizabeth Peers, 50*l.* yearly during her life, being settled upon her by our marriage as a jointure; and to pay the overplus of such rents and profits unto my two nephews, John Consett Peers, and Daniel Letsom Peers, and their assigns, and to the survivor of them and his assigns, during the life of my wife: and from and after the death of my wife, then to the use of the said J. C. Peers and D. L. Peers, during their lives, and the life of the longest liver of them, without impeachment of waste: and from and after the determination of that estate, to the use of the said H. Vyvyan and his heirs, during the lives of the said J. C. Peers and D. L. Peers, and the life of the longest liver of them, *upon trust to preserve the contingent uses and estates, &c. but nevertheless to permit the said J. C. Peers and D. L. Peers and the survivor of them during their lives, and the life of the longest liver of them, to receive and take the rents and profits of the said lands and premises for their own use: and from and after the several deceases of the said J. C. Peers and D. L. Peers, then in trust for the heirs male of the body and bodies of the said J. C. Peers and D. L. Peers: and in default of such issue, then to and for the use and behoof of my kinsman Joseph Terry and his heirs." The testator died in 1798, leaving his widow and both his said nephews him surviving. The nephews entered into possession of the demised premises. The widow died shortly after the testator. J. C. Peers, one of the nephews, died in 1798, without issue; the other nephew D. L. Peers, survived him, and on his death entered into possession of all the premises, and had issue male one son only, who was born in 1792 and died in 1796, without issue. In Easter Term, 1805, D. L. Peers suffered a recovery of the premises, and in April, 1807, he granted a lease of the premises to the defendant under which the defendant is in possession. D. L. Peers, by his will of the 15th of April, 1807, devised the same premises to his daughter in tail general, and died before the date of the demise in this ejectment; leaving his

daughter, and Joseph Terry the lessor of the plaintiff, and devisees in remainder under the will of the said H. Peers, him surviving. The question was, whether the lessor of the plaintiff were entitled to recover all or any part of the premises in question.

DOE,
on the demise
of TERRY,
v.
COLLIER.

Marryat, for the plaintiff, contended that D. L. Peers had not a sufficient estate in him at the time to give effect to the recovery suffered by him. The two nephews of Henry Peers, the testator, took joint estates for life with several inheritances in tail male, from whence the Court would infer cross remainders: and the only question is, whether the estates to the heirs male be of the same quality as the estates for life of the nephews, without which they could not unite, as was settled in *Shapland v. Smith*,† and *Silvester v. Wilson*,‡ so as to enable D. L. Peers, the survivor of the two nephews, to bar the entail by suffering the recovery. The testator's manifest intention was to prefer the heirs male of his nephews, and in default of such, then his kinsman Joseph Terry, the lessor, before the daughters of his nephews: the Court therefore will give such a construction to the will as the words may bear, so as best to effectuate that intent. It is clear that the estates for lives of the nephews, and the survivor of them, are legal estates. The only question is, whether the devise to the trustee and his heirs in trust for the heirs male of the bodies of the nephews be executed, so as to make that also a legal estate; for otherwise it could not unite with the legal life estate of the nephews. But to construe it so, would defeat the manifest intention of the testator; for he changes from legal to equitable and from equitable to legal estates, in carving out the several interests to the devisees, as it seems, for the express purpose of preventing the tenants for life from barring the entail by a union in them of the legal estate of inheritance. During the widow's life, the trustee, who was to pay her an annuity out of the rents and profits, took of course the legal *estate. The next remainder is to the use of the nephews for their lives; that use was executed in them. The next limitation is to the use of the trustee to preserve contingent remainders, &c. which was of course executed in the trustee.

[379]

[*380]

† 1 Br. C. C. 74.

‡ 1 R. B. 519 (2 T. R. 444).

DOE
on the demise
of TERRY
v.
COLLIER.

Then the next is to him in trust for the heirs male of the bodies; which varies from the term made use of in limiting the legal estate for the lives of the nephews, which is to their use; and the last legal limitation to Joseph Terry is also to the use of him and his heirs.

J. Berens, contrà, was stopped by the Court.

LORD ELLENBOROUGH, Ch. J.:

The testator uses the words "trust" and "use" indifferently: both of them are within the operation of the statute; for a trust may be executed as well as an use. And nothing else is relied on but the change of these words in order to denote the testator's intention. In truth, in every case where a testator creates an estate tail by words of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail: but the rule of law notwithstanding attaches to give the first taker an estate tail.

PER CURIAM:

Postea to the defendant.

1809.
June 17.

[395]

WINTERBOURNE v. MORGAN AND OTHERS.

(11 East, 395—405.)

Where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass *quare clauum fregit* for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law.†

THE plaintiff declared in trespass, that the defendants on the 30th of December, 1807, and on divers other days, &c. with force and arms broke and entered the dwelling-house of the plaintiff, and then and there disturbed him in his possession thereof, and remained there for a long time, to wit for ten days then next

† Note that the trespass was in respect of the plaintiff's possession of the house. Goods distrained are not in the distrainer's possession, but "in

the custody of the law": *West v. Nibbs* (1847) 4 O. B. 172, 17 L. J. C. P. 150.—F. P.

WINTER-
BOURNE
v.
MORGAN.

following, and then and there seized, took, and carried away the plaintiff's goods, and converted the same to their own use, against the peace, &c. to the plaintiff's damage of 500*l*. Some of the defendants demurred specially; and the defendant Morgan pleaded not guilty; and at the trial before Lord ELLENBOROUGH, Ch. J. at Westminster, gave in evidence, that the breaking and entry was made by virtue of a warrant of distress issued by the plaintiff's landlord against the plaintiff for 50*l*. rent in arrear, under which the goods in question were taken and sold: but it appeared that the defendants continued in possession of the goods upon the premises for eleven days before they began to remove them, and did not quit the premises till four days after that, during which four days they were employed in removing the goods; after which they were sold in payment of the rent. A question was then raised on the part of the defendants, whether as their original entry and possession under the warrant of distress was lawful, and only their continuance in possession, after the time allowed by law,[†] unlawful; and *the stat. 11 Geo. II. c. 19, s. 19, having provided, that where any distress has been made for rent, "and any irregularity or unlawful act shall be afterwards done by the party distraining, the distress itself shall not therefore be deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity, shall and may recover full satisfaction for the special damage he shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff:" whether the action of trespass *vi et armis* were the proper remedy; or whether it should not have been an action on the case? And as the point was admitted to be new, §

[*396]

† The stat. 2 W. & M. st. 1, c. 5, † directs that goods distrained for rent may be appraised and sold, if not replevied within five days: and the stat. 11 Geo. II. c. 19, s. 10, provides that they may be secured and sold upon the premises, in like manner, and under the like directions, as under the 2 W. & M.

§ The case of *Griffin v. Scott*, 2 Ld. Raym. 1424, where the landlord, keeping a distress on the premises for an unreasonable time after the five days allowed by the stat. 2 W. & M. st. 1, c. 5, namely, for eight days, was held to be a trespasser, was before the stat. 11 Geo. II.

† Now modified by 51 & 52 Vict. c. 21, ss. 5, 7.—R. C.

WINTER-
BOURNE
v.
MORGAN.

a verdict was found for the plaintiff, for damages, and leave was given to the defendants to move to set it aside and enter a nonsuit, if the Court should be of opinion that the objection was well founded. This was accordingly moved on a former day, and the case of *Wallace v. King*,† was referred to in support of the objection; where it was held that trover would not lie for goods irregularly sold under a distress since the statute 11 Geo. II.; that statute having exempted the party making such irregular distress from being deemed a trespasser *ab initio*, and given an action on the case to the party grieved: the Court there considering trover the same in effect as trespass. And *Etherton v. Popplewell*,‡ which *was also mentioned, where the action of trespass was maintained, was distinguished from this, on the ground that the defendant had, at the time of making the distress, turned the tenant's family out of possession; which was a distinct and substantive act of trespass, not within the scope or protection of the Act; and had also continued in possession of the house after the rent was paid.

[*397]

[After argument upon the rule:]

[400]

LORD ELLENBOROUGH, Ch. J. :

I should have had great doubt in this case, whether upon the construction of the statute the action of trespass were well founded, if one of the trespasses charged and proved had not been the taking and removing of the goods from the premises, and the disturbance of the plaintiff's possession of his house *after the time when by law they ought to have been removed; and the case had only rested upon the mere personal remaining of the party on the premises without any act done by him after the time allowed by law. The statute provides, that where the entry for the distress is lawful, the distrainer shall not be deemed a trespasser *ab initio* by reason of any irregularity or unlawful act done by him afterwards; but the party grieved shall recover satisfaction for the special damage thereby sustained, and no more, in an action of trespass, or on the case, at the election of the plaintiffs. But I cannot consider this election as giving him the option of either of those remedies in every case of an unlaw-

[*401]

† 1 H. Blac. 13.

‡ 6 R. R. 235 (1 East, 139).

WINTER-
BOURNE
v.
MORGAN.

ful act or irregularity, whether adapted to the nature of such act or not by the general rules of law. I cannot, for example, consider it as enabling him to maintain trespass against the distrainer either for an excessive distress, or for a detaining in his hands of the proceeds of the goods sold under the distress *ultra* the rent and costs. I must therefore understand the option as given, according to the subject matter of the grievance, *i.e.* to maintain trespass, where by the general rules of law trespass would be the proper remedy; and case, where case would be so. And in the instance I have last put, if the party grieved chose to waive his complaint for the tort, and to bring assumpsit to recover back the surplus money withheld from him, I see no reason why he may not do so. The statute, however, having said that the party whose entry was at first lawful shall not be deemed a trespasser *ab initio* for any subsequent irregularity or unlawful act, I should have had great doubt whether the mere act of remaining in possession of the goods on the premises after the time allowed by law, if the same had not been accompanied or followed by the act of removing them, must not *have been referred to the original lawful entry by the operation of the statute; and thereby have assimilated this to the case of one who enters by leave of the owner, and does not quit at the time, or after the purpose satisfied, to which his leave extended; who according to the doctrine discussed in the *Six Carpenters'* case,[†] is not, by merely not doing what he should, a trespasser. I would not be understood to say that in no case will a party be a trespasser by continuing in possession of another's property after the time allowed by law: such continuance may, and in many cases must be accompanied by a repetition of the same or different acts of trespass, with those which attended the original entry: but my doubt arises upon the particular provision of this statute, which says that he shall not be deemed a trespasser *ab initio* by reason of any subsequent unlawful act or irregularity, *i.e.* merely on such account; and from the difficulty of saying when and in what cases the mere continuance of a lawful entry and possession would by the general rules of law become a new substantive trespass. The true test, as it appears to me, by

[*402]

† 8 Co. Rep. 146.

WINTER-
BOURNE
v.
MORGAN.

[*403]

which it may be decided whether a mere remaining on the premises, without a new breaking and entering, be properly a trespass, where the original breaking and entering is protected from being so by the provision of the statute, is by considering whether a declaration in trespass that the defendant with force and arms remained on the premises for so many days, without more, would be good. I am not at present aware of any authority or principle of law which would warrant such a mode of declaring in trespass. In this case however, as I have said already, we are not driven to the necessity of deciding whether the mere act of remaining on the premises *after the allowed time be a trespass in itself, inasmuch as the act of removing the goods after such time appears to me to be a substantive trespass ; and that notwithstanding the party removing may have acquired a lawful property in the goods themselves by means of a distress originally lawful. For it is not a necessary consequence of law from the circumstance of my having goods in another man's close, that I may remove them by my own act :† and it appears to me to make no difference that I might once have removed those goods from the place where they now are, and have done all necessary acts for the purpose, without being a trespasser, when the authority which exempted me from being so has wholly ceased. After that period perhaps even a mere act of egress, but much more probably the active interference with goods antecedently on the premises, by changing their position there and removing them therefrom, may be deemed a trespass ; and if the latter act be a trespass, it is sufficient for the purpose of the present action.

GROSE, J. agreed on the same ground.

LE BLANC, J. :

I think that this action is maintainable ; and I wish not to be concluded in any subsequent case from saying that a party might be a trespasser by continuing on the premises wrongfully, even though he did not remove the goods therefrom after the time allowed by law. All that the Act, as I conceive, meant to say,

† *Vide* Cro. Eliz. 246, and 2 Rol. Rep. 55.

was that a party whose entry was lawful to take a distress on the premises should not be made a trespasser *ab initio* for any subsequent irregularity, as he was deemed to be before *that act. The object of it was to separate that which he had a right to do from that which was irregular and unlawful: and therefore it meant to say that the landlord should not be deemed a trespasser for entering and taking the goods in the first instance, or for continuing in the possession of them on the premises for so long time as the law allowed him to continue there: but that if he continued there after that time, he should be treated as a trespasser for that which was in law a trespass; or be liable to an action on the case for such injuries as would in law subject him to that remedy by the party grieved, according to the nature of the act done by him. I admit that if he did not continue on the premises after the time allowed by law, but were guilty of an irregularity during that time, he would not be liable in trespass *quare clausum fregit*, because his continuance there for the purpose of guarding the distress would be lawful: but here he remained there after that time; and that I think made him a trespasser, even if he had not taken away the goods afterwards.

WINTER-
BOURNE
v.
MORGAN.
[*404]

BAYLEY, J. :

I am bound to say, upon what appears to me to be the true construction of the statute, that the defendant in this case was a trespasser; and that trespass is the proper remedy against a person who has made a distress continuing upon the premises after the time allowed by law; because I think his continuing there in possession of the goods after that time did not divest him of the property in those goods taken under the distress, or make him liable to an action of trespass for removing them after that time: and if not, this action would not be maintainable if he were not a trespasser by continuing on the premises after the time allowed by law for removing *the goods. A continuation of every trespass is in law a new trespass, as a continuation of every imprisonment beyond the time allowed by law is a new imprisonment. I consider this declaration as imputing to the defendant that for every day's continuance on the premises after the time allowed by law, he was a trespasser, and therefore that he was a tres-

[*405]

WINTER-
BOURNE
v.
MORGAN.

passer for nearly ten days of the time. The jury were not to give the plaintiff damages for the defendant's continuing upon the premises for the time, during which he was justified in remaining there by the act; but the defendant was to be considered a trespasser, and the plaintiff entitled to damages, for the time the defendant remained there afterwards.

Rule discharged.†

1774.
At West-
minster.
—

[405, n.]

† WASHBORN v. BLACK.
Sittings at Westminster after
Michaelmas, 1774.
Buller, J.'s, MS.

Trespass for entering a house, and taking goods, &c. This was done in taking a distress for rent. After the distress was taken a man was left in possession till the fifth day, and then the goods were replevied. During the five days the person left in the house went into different parts of it.

Mr. Dunning insisted that he was a trespasser; for he ought either to have put the goods all into one room, and kept possession of that only, or to have removed the goods out of the house. And he cited a case of *Thornton v. Cruther* and others, C. B. Mich. 9 Geo. III. before Lord Chief

Justice Wilmot, where it was so holden.

Lord MANSFIELD, Ch. J., said that the strict law was so; and that the man might if he pleased have stripped every room and put all the goods together, and by that means greatly damaged them: but instead of doing that, he acted for the benefit of the plaintiff, and left the goods as he found them: therefore he should leave it to the jury to consider whether the plaintiff did not consent. The only evidence of consent was that Mrs. Washborn had said how much she was obliged to Mr. Mountfort, who had acted like a gentleman. And on this his Lordship left it to the jury to consider, whether the plaintiff did not consent to an act which he said was clearly for his benefit.

Verdict for the defendant.

ROUTH *v.* THOMPSON.

(11 East, 428—435.)

1809.
*June 20.*SAME *v.* SAME.

[428]

(SECOND ACTION.)

(13 East, 274 — 290.†)

After a proclamation by the King in council to detain and bring into port all Danish vessels, a hired armed ship of his Majesty took and carried into Lisbon a Danish vessel, and sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a Court of Admiralty, and afterwards took in a cargo on freight for England, and sailed on the 3rd of November from Lisbon; on which day hostilities were declared against Denmark by another proclamation of the King in council; after which an insurance was made on the ship and freight by order and on account of the captors. Held that a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained averring the interest to be in the Crown, and the insurance to be made on account of his Majesty; and that the captors had no insurable interest, as they could claim nothing of right, but only *ex gratia* of the Crown; the Dane having been seized and detained before any declaration of war against Denmark, and the captors having no claim to prize under the Prize Acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court.

But the King having subsequently, by Order in Council, adopted the insurance; held in a subsequent action by the same plaintiff averring interest in the King, that the plaintiff was entitled to recover as a trustee for his Majesty.

THIS was an action upon a policy of insurance tried before Lord Ellenborough, Ch. J. at Guildhall, in which a verdict was taken for the plaintiff for 276*l.* 7*s.*; subject to the opinion of the Court on the following case.

That on the 2nd of September, 1807, an order by the King in Council was made, of that date, which ordered that no subject should be permitted to enter and clear out for any of the ports within the dominions of the King of Denmark until further orders; and that a general embargo should be made of all vessels belonging to the subjects of the King of Denmark then within or which should thereafter come into any of the ports, &c. of his Majesty's dominions, together with all persons and effects on

† *Mackenzie v. Whitworth* (1875) 1 Ex. Div. 36, 43, 45 L. J. Ex. 233, 33 L. T. 655.

ROUTH
v.
THOMPSON.

[*429]

board such vessels; and directing the commanders of his Majesty's ships of war and privateers to detain and bring into port all vessels belonging to the subjects, or bearing the flag, of the King of Denmark; but that the utmost care should be taken for the preservation of all and every part of the cargoes on board any of the said vessels; so that no damage or embezzlement whatever be sustained. And the Lords Commissioners of his Majesty's Treasury were to give the necessary directions therein as to them might appertain. This Order of Council was gazetted on the 5th of September; and on the 10th the officers, crew, and soldiers on board *his Majesty's hired armed ship, called *The Duchess of Bedford*, in the pleadings mentioned, took and detained off the coast of Lisbon the Danish ship *Knud Terkelson* loaded with salt, the property of Danish subjects, and sent her into Lisbon, being in a very leaky state, and requiring considerable repairs, which were then performed; and the salt was sold towards defraying the expense of such repairs, but was insufficient for that purpose: but no proceedings were instituted in any court of admiralty. The ship being repaired, and there being at the time a considerable demand at Lisbon for tonnage to convey British property to England, the captors by their agents took on board of her a cargo of wines and other merchandize to be carried to London on freight, which would have amounted in the event of the ship's arrival at London to 1,510*l*. On the 3rd of November, 1807, another order of the King in Council was published, reciting that the King of Denmark had issued a declaration of war against his Majesty and his subjects; and ordering that general reprisals should be granted against the ships, goods and subjects of the King of Denmark, excepting any vessels to which his Majesty's licence had been granted, &c.; so that as well his Majesty's fleets and ships, as also all other ships and vessels that shall be commissioned by letters of marque, or general reprisals, or otherwise, by his Majesty's commissioners for executing the office of Lord High Admiral of Great Britain, shall and may lawfully seize all ships, vessels, and goods, belonging to the King of Denmark or his subjects, &c., and bring the same to judgment in any of the courts of admiralty within his Majesty's dominions, &c. On the 3rd of November, 1807, the

ship with her cargo of wines, &c. on board sailed with convoy from Lisbon on the voyage insured, and in *December following was lost by the perils of the sea. The plaintiff on the 12th of November, by order and on account of the captors, effected the policy declared on at and from Lisbon to London, at a premium of 12 guineas per cent., to return 5*l.* per cent. for convoy: and the insurance was declared to be 3,500*l.* on the ship *Knud Terkelson*, valued at 3,500*l.*, and on freight; but the freight was not valued in the policy; and the defendant subscribed the same for 300*l.*, and received the premium thereon. None of the officers or crew of *The Duchess of Bedford* are owners of that ship; neither is his Majesty the owner thereof, otherwise than as having hired the same as an armed ship, to be employed as such for a time in his Majesty's service. The defendant has not paid the premium into Court. If the Court were of opinion that the plaintiff was entitled to recover, the verdict was to be entered for him, on such counts, and for such sum, as they should direct: if otherwise, a nonsuit was to be entered; and this case was to be turned into a special verdict, if the Court should so think fit.

ROUTH
v.
THOMPSON.
[*430]

The case was argued on a former day by *Richardson* for the plaintiff, and by *Carr* for the defendant: and the questions made were, whether the detainers or captors had an insurable interest in the ship and freight on their own account, founded upon a lawful possession, with the certain expectation, as it was called, of a grant from the Crown on the condemnation of the prize. Or if they had no such insurable interest *suo jure*, whether they could sustain the action upon a count in the declaration alleging the interest to be in his Majesty, and the insurance to have been made on his account.

Carr denied that the Crown had adopted the act of insurance in this case; on which ground principally he distinguished this case from *Lucena v. Craufurd*. The subject has been so exhausted in the full report of the case of *Lucena v. Craufurd* † in the House of Lords, that it is needless to repeat the arguments and authorities, all of which are there collected.

[431]

† 6 R. B. 659 (2 Bos. & P. (N. R.) 269), and *vide* Park on Insurance (6th edit.), 300.

ROUTH
v.
THOMPSON.

Lord ELLENBOROUGH, Ch. J. said, that the case involved a question of considerable magnitude; and that the Court would consider of it. And at the end of the Term his Lordship delivered their opinion :

This was an action on a policy of insurance upon ship and freight from Lisbon to London. The ship was a Dane, had been seized as such after his Majesty's proclamation of 2nd September, 1807, by his Majesty's armed ship *The Duchess of Bedford*, had received some repairs at Lisbon, and had taken in a cargo there for London. In one count the interest is averred to be in his Majesty, and the insurance is stated to have been on his account; and in another, the interest is averred to be in the commander, officers, and crew of *The Duchess of Bedford*; and the insurance is stated to have been on their account. The case expressly states that the policy was effected on account of the captors; and that statement precludes us from considering it as effected on account of the Crown. Had there been no such specific statement, it might have been open to us to consider, whether the policy were not referable to the interest of the Crown: but after a distinct statement that it was effected (not on behalf the Crown, but) on account of the captors, *it must be referred wholly to them, and the plaintiff must recover or fail according as they have or have not a right to aver an interest in themselves. This brings us to the question, Whether they had an insurable interest? Their right in this respect has been put upon two grounds; first, That they had a well-grounded expectation, warranted by the practice of the Crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them: and, secondly, that they had the lawful possession, and were liable either to the Crown or the foreign owner, for the safe custody of the vessel: and that on either of these grounds they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right; they could demand nothing of the Crown. Had the Crown made the grant in their favour, it would have been altogether *ex gratiâ*, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part

[*432]

ROUTH
v.
THOMPSON.

only. The bounty of the Crown would probably have been proportioned to the merit of the detention and capture, and the value of the prize: Had any considerable danger attended the performance of these services, the grant would probably have extended to the whole; had there been no danger or difficulty in them, the grant would probably have been smaller: and had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there probably would have been no grant at all. At any rate, however, if there were a grant, it would be mere bounty; and has a man a right to indemnity, because he has lost the chance of receiving a gift? Had the ship arrived in *safety, the captors would have had the chance of a grant from the Crown; but can they, in respect of that chance, insure the ship's arrival? To what extent could they insure? Not to the whole value, because the grant might only have been of part; nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance, and how is that to be estimated? Is application to be made to the Crown, to know what it would have granted if the ship had arrived? And what is to be the case if the answer be, as it probably would be, that the Crown never has considered, nor has occasion to consider, that point. Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the King's; the freight is altogether the King's; and the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the King may be induced to give them something out of the produce of such ship and freight? In *Le Cras v. Hughes*,† which was

[*433]

† Park Insur. 269, p. 568, ed. 1842.

[ROUTH
v.
THOMPSON.

[*434]

cited in the argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent; and the Court decided that the capture was within the Prize Act, and the *captors had therefore a right vested by that Act. It is true that another question (which Lord MANSFIELD considered as by no means the strongest) was raised, whether possession and the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounted to an insurable interest? and the Court gave a decided opinion that it did. But what fell from Lord ELTON in *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 323,† is materially at variance with the decision of the Court of K. B. on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of K. B., in respect to a contingency of the nearly certain kind which was then under consideration, would afford no rule to govern a case circumstanced like the present. As to the second ground, that the captors had the lawful possession, and were responsible either to the Crown or to the Danish owners for the safe custody of the vessel; is this a true representation of their situation? They certainly had the lawful possession; but were they responsible for the ship's safety, unless as far as that safety might be endangered by any wrongful acts of their own. The seizure was warranted by the King's proclamation: that made their possession lawful. The subsequent declaration of hostilities put an end to any claim by the Danish owners, and of course to all responsibility of the captors, in respect to them. It then became their duty to act for the best, with a view to the safety of the ship, and the mere interest of the Crown therein. They were bound to leave Lisbon; it was for the interest of the Crown that they should make the ship instrumental in withdrawing from Lisbon as much property as she could properly carry: they acted, therefore, for the *best, and were consequently justified in respect to the Crown in what they did. The Crown cannot call upon them for damages; and they have no right to ask for a sum, as an indemnity, when they have not been, and (under the

[*435]

circumstances stated) could not have been damnified. The consequence is that the plaintiff has no right to recover upon the policy. The question then arises, whether he has any right to recover back his premium? and as there was no fraud in the captors in effecting this policy; as there was no illegality in the voyage or insurance; and as the resistance of the underwriters to the claim upon the policy proceeds upon the ground that there was no risk; the plaintiff is entitled to his premium, and the verdict should be entered accordingly.

ROUTH
v.
THOMPSON.

K. B. HILARY TERM.

1811.
Feb. 1.

ROUTH v. THOMPSON.

[13 East,
274]

(SECOND ACTION.)

(13 East, 274—290.)

THIS was an action of *assumpsit*, commenced by the plaintiff on the 21st of June, 1810, upon a policy of insurance effected by him in his firm of P. and H. Le Mesurier & Co., and subscribed by the defendant for 300*l.* upon the 12th of November, 1807, upon the ship *Knud Terkelson*, valued at 3,500*l.*, and on freight not valued, at and from Lisbon to London. The interest was averred to be in his Majesty, and the loss stated to be by *perils of the sea. The defendant pleaded the general issue, and at the trial before Lord Ellenborough, Ch. J., at the sittings after last Trinity Term at Guildhall, a verdict was found for the plaintiff, for 298*l.* 11*s.* 0*d.*, subject to the opinion of the Court on the following case :

[*275]

[The case, so far as relates to the Order in Council of the 2nd Sept. 1807, the capture of the ship in question, the Order in Council of the 3rd Nov. 1807, the sailing of the ship on the voyage insured, and her loss by perils of the sea, was to the same effect as in the former case. The manner of the insurance and subsequent Order in Council were then stated as follows:]

On the 28th of October, 1807, Mr. Sampson, being appointed agent by the said captors, sent to the plaintiff the following order

[276]

ROUTH
 v.
 THOMPSON.

[*277]

for insurance:—"London, 28th October, 1807. GENTLEMEN, Mr. John Leigh of this city having recommended me in case of being willing to make any insurance on shipping to your house, I have to request the favour of your insuring for my account the Danish vessel named the *Knud Terkelson*, which has *been detained by his Majesty's armed ship *Duchess of Bedford*, and for which I am authorized to act as agent. The *Knud Terkelson* is 350 tons burthen, &c. and valued in 3,500*l.*, which sum I beg you will insure, as also the freight she may make as interest may appear by her bills of lading hereafter. The ship is not armed, and will go from hence to London with or without convoy: you will therefore govern yourselves accordingly. She is to sail in the course of a few days hence, and I wish her to be insured against all risks. I have no doubt, from the recommendation of Mr. Leigh, that you will do the best for the interest of the concerned. (Signed) J. J. SAMPSON."

[*278]

The plaintiff, on the receipt of this letter on the 12th of November, 1807, procured the policy in question to be underwritten by the defendant, at and from Lisbon to London, at a premium of 12 guineas per cent., to return 5*l.* per cent. for convoy. The insurance was declared to be 3,500*l.* on the ship *Knud Terkelson* valued at 3,500*l.*, and on freight; but the freight was not valued in the policy. None of the officers or crew of the *Duchess of Bedford* are owners of that vessel: neither is his Majesty the owner thereof, otherwise than as having hired the same as an armed ship, to be employed as such for a limited period in his Majesty's service. On the 20th of June, 1810, the following order was made by his Majesty in Council. "Whereas by his Majesty's Order in Council of the 2nd of September, 1807, it was ordered, that the commanders of his Majesty's ships of war and privateers should detain and bring into Court all ships and vessels belonging to the subjects of the King of Denmark, or bearing the flag of the King of Denmark, but that the utmost care should be taken for the preservation of the cargoes on board, &c. And whereas it has been represented *unto his Majesty, that on the 10th of September, 1807, his Majesty's armed brig *Duchess of Bedford*, under the command of Capt. R. Mitford, took and detained off the coast of Lisbon a Danish ship

ROUTH
v.
THOMPSON.

called the *Knud Terkelson*, laden with a cargo of salt, the property of the King of Denmark; and that the ship being so leaky that she could not proceed to England without repair, she was sent into Lisbon, where she received considerable repairs, and her cargo of salt was sold to defray the expenses of such repairs: and upon the completion thereof the said ship *Knud Terkelson*, having on board a cargo of wines, &c. to be brought to London on freight, sailed upon the voyage to London, but was driven by stress of weather upon the coast of France in December, 1807, and totally lost: and it hath been further represented to his Majesty that the said Capt. Mitford did on the 12th day of November, 1807, cause an insurance to be effected by Messrs. P. and H. Le Mesurier of London, merchants, (i.e. the plaintiff,) for 5,500*l.* on the said ship and her freight: and whereas it is judged expedient that his Majesty should adopt and approve of the said insurance and authorise, as far as in law he may, the recovery thereof; his Majesty doth therefore, by and with the advice of his Privy Council, hereby adopt and doth approve of the said insurance; and doth hereby permit and authorize the said Messrs. P. and H. Le Mesurier & Co. to sue for and recover payment of the sums thereby insured for his Majesty's benefit, and to make the necessary averments in any proceedings at law for obtaining a legal determination upon the rights of the agents effecting the said insurance to recover and enforce payment thereof for the benefit and on behalf of his Majesty, but subject to the condition that Messrs. P. and H. Le Mesurier shall hold whatever sum of money they may *recover, after payment of all expenses incurred in the recovery thereof, at the disposal of his Majesty: whereof all persons concerned are to take notice and govern themselves accordingly. (Signed) W. FAUKENER."

[*279]

The defendant has paid the premium into Court; and no proceedings were ever had in the Admiralty Court or elsewhere against the said ship *Knud Terkelson*, for the purpose of condemning her as a *droit* of admiralty to his Majesty. The question was, whether the plaintiff were entitled to recover? If he were, the verdict was to stand: if not, then a nonsuit was to be entered. But the special case might be turned into a special verdict, if the Court thought fit.

ROUTH
v.
THOMPSON.

Richardson, for the plaintiff, made two questions: 1st. Whether the King had an insurable interest? 2ndly, Whether this insurance can enure to his Majesty's benefit? In affirmance of the former, he relied on *Lucena v. Craufurd*,† *Routh v. Thompson*,‡ and *Stirling v. Vaughan*.§ In the first of these cases, the plaintiff finally recovered on the King's interest, though the vessels were not only detained and insured, but most of them were also lost before the order for reprisals issued; whereas here the insurance was not effected till after the order of reprisals against Denmark. This case therefore is so much the stronger in support of the King's interest in the captured vessel. The capture and detention gave the King a legal possession, which it was competent to him to insure: and if he were legally possessed, he had a right to employ the ship for freight, and the freight *would be due to him.

[*280]

(Lord ELLENBOROUGH, Ch. J. said that there was no doubt either here or elsewhere but that the King could insure on the ground of his having a legal possession of a vessel taken from an enemy.)

Then, 2ndly, this insurance may enure for the benefit of the Crown. The rule, *quod omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*, laid down by Lord Coke, and applied to the subject of insurance by BULLER, J. in *Wolff v. Horncastle*,|| and by Lord ELLENBOROUGH, Ch. J. in *Stirling v. Vaughan*,¶ goes the whole length of this case. The captures were made under the authority of the Crown, and the Crown had an interest either general or particular in the preservation of the captured property. Then the persons employed to make the capture had an incidental power to do such acts as were lawful and proper to be done for the preservation of the property, and which tended to the King's benefit, such as to insure it; and though the King might afterwards renounce the act; yet if he did not, it enures for his benefit. In *Lucena v. Craufurd*,†† the letter of Mr. Rose of the

† 6 R. R. 659 (2 Bos. & P. (N. R.) 269) and Park, Ins. 8th ed. 571.

‡ P. 539, *ante* (11 East, 428).

§ *In loco, post* (11 East, 619).

|| 4 R. R. 808 (1 Bos. & P. 323).

¶ *In loco, post*, 11 East, 620, 3.

†† 11 East, 625.

ROUTH
v.
THOMPSON.

Treasury, signifying the King's assent to the insurances, was written after most of them had been effected; and yet no distinction was taken between the cases in that respect. It may be said here that the order for insurance sent by Sampson, being stated to be "for my account," excludes any contemplation of the King's interest: but he could not mean by that expression his own benefit, individually; because he afterwards adds, that he was authorized to act "as agent for the Danish ships detained by his Majesty's armed ship the *Duchess of Bedford*." "On my account" therefore meant no more than *that he was to be answerable for the premiums. Then if any adoption of the insurance were capable of being made in this case by the Crown, it cannot be denied that it has been done.

[*281]

Carr, contra, contended, first, that the insurance was not effected in the first instance on account of the King, but of the captors; and that the King could not, by any subsequent adoption, make an insurance enure to the benefit of the Crown which was really made for the benefit of others: though he admitted that if it had been essentially made on account of the Crown, but without any previous authority, the King might afterwards adopt it. He relied on *Routh v. Thompson*.†

(But Lord ELLENBOROUGH, Ch. J. observed that it was expressly stated as a fact in that case, that the insurance was made on account of the captors.)

To which he answered that the circumstances of the two cases were essentially the same, with the addition of the subsequent adoption of the insurance by the Crown in the Order of Council proved in this case.

(And in answer to another observation of his Lordship, that some of the policies in *Lucena v. Craufurd* were effected before Mr. Rose's letter from the Treasury, adopting the insurance:)

he endeavoured to distinguish the cases, by saying that the Dutch commissioners there were the appointed agents of the Crown.

† P. 539, *ante*, 11 East, 428.

ROUTH
v.
THOMPSON.

(But it was again observed that the commissioners had no express authority to insure ; and in fact their first application to the Treasury to authorize the insurance had been rejected : and in *Stirling v. Vaughan* there was no subsequent adoption by the Crown to do away the effect of the fact found in the case.)

[*282] Still, he argued, that it was a question for *the jury on whose account the insurance was made. That in the last trial of *Lucena v. Craufurd*,† Lord ELLENBOROUGH had directed the jury, that if any of the King's subjects effect an insurance on account of and for the benefit of the King, his Majesty may adopt it ; the propriety of which direction was recognized by the House of Lords : and he insisted that in this case the same question should have been submitted to the jury, and that the evidence stated shewed that it was not effected for the Crown, but for the separate interest of the captors ; and therefore could not be adopted by the Crown.

(Lord ELLENBOROUGH, Ch. J. : For what reason then was a special case reserved, in which it is referred to us to draw the conclusion, whether upon the evidence this insurance could enure to the benefit of the Crown. The general facts were agreed to be stated here, leaving it to the Court to draw that conclusion, if it might be drawn. In the former case, the conclusion of fact was drawn, that the insurance was made on account of the captors. But where it is a mixed matter of construction, it is more proper for the direction of the Court to the jury. The party directing the insurance was appointed agent for the captors, which captors were themselves in one sense the agents of the Crown, and therefore it brings it to the same question. Then, by the terms of the letter of instruction for making insurance, the agent's correspondents were to "do the best for the interest of the concerned." The agent at the time did not know to whose benefit the prize would accrue, nor was it necessary that he should know the very persons interested ; therefore he wrote for the insurance to be made for the benefit of those concerned : then, if it turn out that the interest to be insured was the interest of the *Crown, why may not the Crown

[*283]

† 6 R. B. 710 (1 Taunt. 325.)

adopt it? And admitting that a prize-agent has no authority without such adoption to bind the Crown by making insurance; yet if he do an act for the benefit of the Crown, the Crown may adopt it.

ROUTH
*
THOMPSON.

BAYLEY, J.: In *Stirling v. Vaughan* the captors had an insurable interest; whereas here nobody but the King had an insurable interest.)

He then admitted that if he could not distinguish this case from *Lucena v. Craufurd*, and *Stirling v. Vaughan*, the defendant could not succeed. But he observed further, as to *Lucena v. Craufurd*, that the Dutch ships were seized and detained under a previous order from the Crown to bring them in; whereas here the Danish ship was captured *de bene esse*, as it may be said, upon speculation; and not in consequence of any order from the Crown known at the time. In that case too all that were brought in were condemned, though some were lost before, and the condemnation would refer back to the capture: but here there was no condemnation; which there might have been though the ship were lost: it might have turned out that the supposed prize was a Danish ship under the protection of a British licence; or there might have been meritorious circumstances attending her to induce a restoration by the Crown.

(Lord ELLENBOROUGH, Ch. J.: We can presume nothing upon the subject: we only look to see whether the ship were lawfully possessed by the captors.

BAYLEY, J.: The more improperly the capture was made by those in command of the King's ship, the more necessary it was that the interest being in the King, the insurance should be adopted by his Majesty, to enable him the better, in case of a loss, to indemnify the captured.)

He then referred to the case of the *Flad Oyen*,† to shew that condemnation is *necessary to transfer the property in a prize:

[*284]

† 1 C. Rob. Adm. Rep. 139.

ROUTH
v.
THOMPSON.

but the Court thought that immaterial, upon a question whether the Crown, having through its agents, the captors, a lawful possession, might not insure; though he argued that the ship was not in possession of the Crown, but of those who had taken her upon speculation, without the authority of the Crown.

LORD ELLENBOROUGH, Ch. J. :

The points made for our consideration are, first, whether the King had an insurable interest, supposing he had been apprised of his right at the time when this insurance was made, and had determined to insure it; and next, whether he could adopt it after it was made. The facts are, that after a proclamation by the King in Council for the detention of Danish vessels, an armed ship in his Majesty's service took possession of the Danish ship in question. Was it taken on behalf of the King? It was taken by his servants in an armed brig engaged in his service; and if not taken piratically must have been taken for him. The King therefore had possession of the Danish vessel: for as between his Majesty and those who were acting on his behalf and under his authority, and who were accountable to him if they damaged or embezzled the property, their possession was for this purpose his possession. Then had the King a lawful possession? Was it ever made a question in a court of law, whether the King were a wrong-doer in seizing the vessels of a foreign nation? If then his Majesty had a lawful possession, may he not insure the property against loss? He was legally competent to do so, though not in the practice of insuring his own ships of war. But it may be said that he knew nothing at the time of the insurance.

[*285]

It was effected however by the order of *his officers, whose duty it was to take care of the property, and who were responsible to him for it. Then may he not adopt the act? The insurance is not indeed made in terms in his Majesty's name; but it was made by the direction of Sampson, who had been appointed agent by the captors for the prize: but the captors had no interest of their own in it, and therefore for their own benefit they were not competent to appoint an agent: they must therefore be taken to have appointed him as agent on the part of

ROUTH
"C."
THOMPSON.

the Crown, whose servants and agents they were. Then Sampson writes the letter authorizing the insurance to be made, and therein he desires insurance to be made "for my account." That certainly was not intended as a direction to insure his own individual interest, but merely that credit was to be given to him for the premiums: and he proceeds to state that the insurance is to be made of the Danish vessel *Knud Terkelson*, "which had been detained by his Majesty's armed ship *Duchess of Bedford*, and for which he was authorized to act as agent." There was no communication of the names of the particular persons for whose benefit the insurance was to be made; nor was it necessary that the agent should then know who they were: but it was to be effected in the name of the agent for the benefit of those who should be concerned in interest: and the underwriters bound themselves to indemnify those who should appear to be interested in the prize, in case of loss: it must therefore enure for the benefit of the Crown, which alone had any interest in the captured vessel. The Crown then having an insurable right afterwards adopted this act of its servants and agents. And if the policy were made for the benefit of those concerned, and the Crown were concerned in interest, there can be no doubt that it may adopt the act, *and it has adopted it. The case of *Lucena v. Craufurd* is full in point to this: the Dutch commissioners were strangers to the property before it came within the ports of this kingdom, though connected with it in trust when it was brought there: but the Crown afterwards adopted the insurances effected by their directions; and the House of Lords held that to be a valid adoption, as well in respect of the ships taken before as afterwards. Here then there was an adoption by the Crown of the act by which the property was acquired; and there was also an adoption of the insurance made afterwards to protect it. By the adoption of the act of taking possession, there was an insurable interest in the King; and the adoption of the insurance gave him also an interest in the policy. The facts therefore being expressly stated from whence this conclusion may be drawn, and which it was left to us, by the statement of the case, to draw, there is no occasion to send the question again to a jury.

[*296]

ROUTH
v.
THOMPSON.

GROSE, J. :

Considering the principles upon which the case has been argued, and the cases which have been before decided upon those principles, I am clearly of opinion, without going over the same grounds again, that the plaintiff is entitled to recover on the averment of interest in his Majesty.

LE BLANC, J. :

[*287]

The Danish vessel, which is the subject of this insurance, was taken possession of by the officers and crew of an armed ship in the service of Government, under an Order of Council, shortly after the order issued ; and while the vessel continued in their possession an order was sent by them to the plaintiff to make insurance on her ; and the argument has turned chiefly upon the terms *of the letter directing that insurance to be made. It has been contended that it was an order to insure on behalf of the officers and crew of the armed ship : but upon attending to the terms of the letter, it is not so confined. The direction in the first place to insure “on my account” was neither meant by the writer, nor understood by his correspondents, as an order to insure his individual interest as agent ; nor does he order the insurance to be made on behalf of the captors ; but it is to be made on his account, in the character, as he afterwards describes himself, of agent for the Danish vessel *Knud Terkelson* detained by his Majesty’s armed ship *Duchess of Bedford* : and he concludes by saying that he has no doubt that the best will be done for the interest of the concerned. It is argued however that this is not distinguished from the former case of *Routh v. Thompson*, where the insurance was expressly stated to be made on account of the captors : but here the order is in more general terms ; for it is to insure on account of the agent. Sampson contracts as agent, and the insurance is ordered to be made for him in that character : it would therefore enure for the benefit of the party or parties for whom it should turn out that he was agent. Then the question will be whether the party in whom the interest appears to have been may not adopt the act of the agent, and whether the subsequent ratification shall not be referred to the prior order ? That is decided by the authorities. Here then the

Crown has adopted the insurance. And that brings it to the second question, whether the Crown had an insurable interest? The Danish ship, it is said, was stopped, not under the authority of the Crown, but upon speculation, that such an order might be issued; and that it was not probably known to the captors at the time that such an *order had issued. So it may be said that the insurance was upon speculation that the captors might ultimately receive a benefit from it by the favour of the Crown: but if there existed, at the time, an authority to detain or capture the vessel, whether the captors did or did not know it at that time is not material: the Crown in whose service they were may, if it please, adopt their act. Then if there were a lawful possession in the Crown through its officers and servants, the agents appointed by the persons in the actual possession of the captured vessel might insure it; and that would bring the case within the authority of *Lucena v. Craufurd*. Condemnation was not necessary to give the Crown a lawful possession at the time. I do not consider *Stirling v. Vaughan* † as a case deciding that the verdict could not have been supported on the count averring the interest to be in the Crown: it was sufficient to decide that case that the captors had an insurable interest under the Act of Parliament; for if the verdict for the plaintiffs were sustainable on either of the counts, there was no ground for a new trial. It was therefore unnecessary to come to a final determination on the other point. None of the former cases therefore have decided against an insurable interest in the Crown in this case.

ROUTH
v.
THOMPSON.

[*288]

BAYLEY, J.:

No fair doubt has been raised in this case. It is clear I think that the King had an insurable interest: and I see nothing in the case which shews that the possession of the captors was not a lawful possession. It is said that the Danish vessel was taken upon speculation before the captors could have known of the Order of Council *authorizing the detention: but that is begging the question. It is possible that the captors might have known it at the time: but if they did not, and did make the capture upon speculation; yet if there were an authority existing at the

[*289]

† *In loco, post* (11 East, 619).

ROUTH
v.
THOMPSON.

time, that is enough. Supposing however that the capture was wrongful, on the part of the captors; still I am by no means clear that the Crown might not insure the captured vessel. How would the case stand? There would be a capture of a vessel by the King's officers; and if that were wrongful, the King would be bound in honour to make restitution or compensation to the injured party. Then an insurance made on that possession would provide a fund out of which compensation might be made in case of a loss. But here the King had a lawful possession, and there was no interest in any other than the King, for which an agent could be appointed. Then why might not the King adopt the act? In the former case of *Routh v. Thompson* the Court considered themselves to be tied down by the precise fact stated, that the policy was made on account of the captors, which precluded them from looking at any other interest. In *Stirling v. Vaughan* there was another description of persons, the captors, in whom the interest was averred in one of the counts, who clearly had an insurable interest under the Prize Acts, and therefore the Court applied the insurance to their interest, as being that which was the more likely to have been in the contemplation of the party making the insurance, but without excluding that of the Crown: and whoever reads through the case must see that the Court considered that if there had been no interest in the captors, they would have supported the policy upon the interest of the King. But there is another consideration which bears upon the *question: could the agent who procured the insurance have recovered back the premiums paid by him if the Crown had not adopted the insurance? I should think not; because of the choice which the Crown had to adopt it; in respect of which the assurer would have incurred the risk. If a prize-agent will advance his money for the premiums, upon the hope that the Crown will adopt his act, the circumstance of his not having a valid claim of interest in the prize without such adoption will not preclude the right of the Crown to adopt it.

[*290]

Postea to the plaintiff.

C. P. HILARY TERM.

STEEL *v.* CAMPBELL.

(1 Taunt. 424—425.)

1809.
Jan. 31.

[424]

If the English notice at the foot of common process require the defendant to appear at a return day in an impossible year, it is not an irregularity for which the Court will set aside the proceedings.

BEST, Serjt. had obtained a rule *nisi* to set aside the proceedings on account of an irregularity in the English notice at the foot of the common process. The writ was tested on the 28th of November in the 49th year of his Majesty's reign, and was returnable in 8 days of St. Hilary; but the notice required the defendant to appear on the 20th day of January, 1808.

Shepherd, Serjt. now shewed cause:

In the case of *Doe v. Kightley*, 7 T. R. 63,† a notice to quit at Lady-day, which will be in the year 1795, being delivered after that day, was held a good notice to quit at Lady-day, 1796. *Elliot v. Parrot*, Barnes, 425. To the process was subscribed a notice to appear on the 26th of June, not saying in what year, and it was held sufficient: the naming an impossible year is equivalent to the naming no year; and it appears by the teste, which is after the 20th of January, and return day of the writ, taken together, that the day of appearance must be in 1809.

Best, Serjt., in support of the rule, observed that the stat. 5 Geo. II. c. 27, was express that no process should be good without an English notice at the foot to explain the *writ, and for want of such a notice this writ was bad; for it was not competent to call the writ in aid to explain the notice. This notice could not, as the statute designed it should, inform an ignorant defendant when he was to appear: the notice to appear

[*425]

† 4 R. R. 375.

STEEL in June only omitted to state the year, but this tended to mis-
v.
CAMPBELL. lead, by stating a wrong year. The notice to quit is regulated by no statute.

The COURT observed that as the notice was, to appear at the return of the writ, which was tested subsequently to January, 1808, no man could understand it to require an appearance in January, 1808. The defendant must know that his appearance was required at a future, and not a past day. It was therefore an immaterial mistake, which could do no harm, for what other day could occur to him than the 20th of January, 1809? it was quite impossible that the party should not understand that to be the year intended.

Rule discharged.

1809.
 Feb. 4.

KAYE v. WAGHORN.

(1 Taunt. 428—430.)

[423]

Accord and satisfaction made before breach of a covenant, cannot be pleaded in bar of an action on the covenant.

[*429]

THE plaintiff declared against the defendant, who had conveyed to him certain freehold premises, upon a covenant of the defendant that he and his wife would levy a fine upon request. The defendant pleaded in bar, that after the executing the conveyance and before the request made, it was agreed between the parties that the defendant should execute his writing obligatory in the penal sum of 178*l.* 10*s.* conditioned for his, and his heirs, executors, administrators and assigns, indemnifying the plaintiff against any claim of dower of his wife in respect of the premises, and that the plaintiff should accept *the same in lieu and in satisfaction of the said covenant, and in respect of the said supposed breach thereof; and the defendant averred that afterwards, and before the request made to levy a fine, he did execute his writing obligatory so conditioned, and the plaintiff accepted the same in lieu and in satisfaction and in discharge of the covenant.

To this plea the plaintiff demurred; and assigned for causes

that the covenant was an executory covenant, and yet the defendant had pleaded an accord and satisfaction thereto before any breach thereof, and had alleged such accord and satisfaction to have taken place before the breach; and that the supposed accord and satisfaction was not certain, nor executed, inasmuch as the plaintiff was not necessarily entitled to recover or have execution for the full penalty of the writing obligatory, but such damages only as he might prove to have suffered by reason of the breach of the condition, which damages must be ascertained by a jury of the country, by reason of the form of the condition; and that the said writing obligatory was an instrument of the same nature as that on which this action was brought, and did not give the plaintiff a better or more summary remedy for any damage he might sustain by reason of the breach of the covenant or of the condition; and gave the plaintiff a remedy against the defendant only, and not against his wife if she should survive him; and that the writing obligatory was not a defeasance of the covenant, nor an indemnity against all damages which the plaintiff might sustain by reason of the breach of the covenant, but against the claim of dower only. The defendant joined in demurrer.

KAYE
v.
WAGHORN.

Best, Serjt. would have argued in support of the plea, upon the authority of a case in 2 Roll. Rep. 187, *Rabbetts v. Stoker*; but the Court observed that was a very loose report, and upon the authorities of *Alden v. Blague*, Cro. *Jac. 99. *Blake's case*, 6 Co. 43 b. *Covill v. Geffery*, 2 Ro. Rep. 96. *Snow v. Franklin*, 1 Lutw. 358, and *Palm*. 110, they were clear that a covenant under seal, not broken, could not be discharged by parol agreement. It was not *dissolvi eo ligamine quo ligatur*. Besides, the covenant by a man and his wife to levy a fine involved considerations much more extensive than an indemnity against the wife's dower.

[*430]

Judgment for the plaintiff.

Vaughan, Serjt. was to have argued for the plaintiff.

1809.
Feb. 4.

BARNWELL v. HARRIS.

(1 Taunt. 430—432.)

[430]

A leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption: held that the purchaser was not bound to accept the title.

THIS was an action brought to recover back a deposit of 27*l.* 10*s.* paid upon the purchase of a certain leasehold house, under conditions of sale, which stated that the lot was subject to the yearly ground-rent of two pounds: the plaintiff contended that the premises appeared to be subject to a much larger rent. Upon the trial of this cause at the sittings in Middlesex, after last Trinity Term, before Mansfield, Ch. J., it appeared that the premises, with other houses, were built upon land demised by Reynolds, in the year 1764, at 28*l.* rent; and that Heady, who was said, but not proved, to have his estate, had for more than 20 years past received the separate rent of 2*l.* from the occupiers of this house. MANSFIELD, Ch. J. thought this evidence sufficient to induce the jury to consider whether the rent had been apportioned by the act of the landlord. They found however a verdict for the plaintiff.

[431]

Shepherd, Serjt. having in last Term obtained a rule *nisi* to set aside this verdict and enter a nonsuit, upon the ground that there was sufficient room to presume an apportionment, was now called on to support his rule. He contended that the goodness of the title was to be tried precisely on the same grounds as if the rent were contested between the landlord and tenant; and there, although perhaps the rent could not be apportioned but by deed, it was not necessary the apportionment should be proved by the production of the deed; but after 20 years acceptance of the lesser rent, the deed would be presumed. A purchaser was compellable to accept the title, although there was no deed subsisting to evince the apportionment; in like manner as he could be compelled to accept a title to a fee simple under a possession of 60 years, although no title-deeds should be produced. The question here was, whether

in fact and in law these premises were liable to a greater ground-rent than the 2*l*. If the landlord had distrained upon this lot, and had avowed for the 28*l*. rent, and the tenant had pleaded an apportionment by a deed which had been lost by time and accident, the issue would have been found for him upon this evidence.

BARNWELL
v.
HARRIS.

MANSFIELD, Ch. J. :

The question is, whether it be not the duty of the vendor to give the purchaser a complete formal discharge of all the further rent that the house was ever liable to : for if not, the purchaser is put to the necessity of finding evidence to make this apportionment appear. Must he then risk the loss of his apportionment for want of evidence? A court of equity would not decree a specific performance in this case, unless the plaintiff could procure the ground-landlord to apportion the rent by joining in an assignment of the lease, in which assignment the apportioned rent should appear.

HEATH, J. :

[432]

It is a technical rule among conveyancers, to approve a possession of 60 years, as a good title to a fee simple. An apportionment may be presumed here, but is it not such a presumption as may be rebutted by contrary evidence? The apportionment is an improbable thing, for if a house should fall down, and if it were not worth the tenant's while to build it up, the landlord who has consented to an apportionment must lose his remedy for the rent *pro tanto*.

CHAMBRE, J. :

The question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence : and in this case there is much to be rebutted ; for a landlord who can come upon the whole for his rent, would be very unwise to restrict himself to the security of a part only.

Rule discharged.

Best, Serjt. for the plaintiff.

1809.
Feb. 4.

GRANT v. GUNNER AND ANOTHER.†

(1 Taunt. 435—449.)

[435]

There can be no approver in derogation of a right of common of turbary.
At common law the lord might approve against common of pasture
appendant.

THE plaintiff declared that the defendants broke and entered a certain close of the plaintiff in the parish of Farnborough, in the county of Southampton, and dug up, prostrated, and levelled a certain mound or fence of the plaintiff, there then erected, and separating and dividing the close from a certain common called Farnborough common, contiguous thereto, and with the materials of the said mound or fence filled up and levelled a ditch of the plaintiff before then made in the said close, contiguous to the said mound or fence, and laid and left open the said close to the common, and kept and continued the same so laid and left open until the suing out of the plaintiff's writ. The defendants pleaded, 1st, Not guilty. 2ndly, As to the breaking and entering the close, and digging up, pulling down, prostrating and levelling the mound or fence, and filling up and levelling the ditch, and laying open the said close, that at the time when, &c. there was, and immemorially had been a certain large common called Farnborough common, consisting of divers, (to wit) 500, acres of land, within and parcel of the manor of Farnborough; of which common the close in which, &c. during all the said time had been and still was parcel. The plea then stated a grant to the defendant Mary Gunner in fee simple, of a certain copyhold messuage and land within the manor, and averred a custom that the tenants thereof had immemorially had common of turbary, (to wit,) peat and turf, in and upon Farnborough common, to be had and taken for his and their necessary fuel, to be burnt and consumed in the said messuage, every year, and at all times of the year, as occasion required, as belonging and appertaining to the said customary tenement with the appurtenances; *and that the defendant Mary Gunner demised the same tenement for

[*436]

† Compare *Arlett v. Ellis* (1827) L. B. 4 Eq. 613, 642, 36 L. J. Ch. 7 B. & C. 346, 370. And per MALINS, 763, 16 L. T. N. S. 475.—R. C. V.-C. in *Wakefield v. Buccleuch* (1867)

GRANT
C.
GUNNER.

a year to Ann Gunner, who entered and was possessed thereof; and she being so possessed, because the said mound or fence had been wrongfully erected, put, and placed in and upon the common, parcel, &c. and at the time when, &c. was there wrongfully standing and being, and wrongfully separated and divided the said close, parcel of the common, from the residue thereof; and the said ditch had been wrongfully made and dug in and upon the common, and at the said time when, &c. so continued, so that the said Ann could not have and enjoy her said common of turbary in and upon the said common in so ample a manner as she then and there ought to have done, the defendants, as the servants of the said Ann, and by her command, at the time when, &c. broke and entered the said close, and dug up, pulled down, prostrated, and levelled the said mound or fence, and with the materials thereof filled up, and levelled the ditch, and laid open the said close, parcel of the common, to the residue thereof, as they lawfully might, &c. The defendants thirdly pleaded a right of common of pasture for cattle levant and couchant on the same tenement. The replication to the second plea admitted the facts stated in it, but pleaded a conveyance by lease and release from Valentine Henry Wilmot, the lord of the manor of Farnborough, to the plaintiff, of the close in which, &c. thereby described as part of the waste ground within the manor of Farnborough, (that is to say, of the said waste or common in the second plea mentioned,) with the appurtenances, to have and to hold the said close in which, &c. with the appurtenances, unto and to the use of the plaintiff his heirs and assigns for ever, to the intent and purpose that the plaintiff might and should inclose the said close in which, &c. and improve the same in such manner as the said Valentine Henry Wilmot, as lord of the manor, could or might, under any law then in force, inclose *and improve the same. By virtue of which indenture, and by force of the statute, the plaintiff became seised in his demesne as of fee; and being so seised, afterwards, and before the time when, &c. did inclose the close in which, &c. then being part of the common called Farnborough common, from the residue thereof, by the said mound or fence, to hold the same place in which, &c. with the appurtenances, to him the plaintiff his heirs and assigns

[*437]

GRANT
v.
GUNNER.

[*438]

for ever, in severalty, to the only proper use and behoof of him the plaintiff his heirs and assigns for ever ; and did then approve the same, there being then left by him the plaintiff, and remaining in the residue of the common, sufficient common of turbary, to wit, peat and turf, to be had and taken for the necessary fuel of the said Ann, to be burnt and consumed in the said messuage, every year, and at all times in the year, as occasion might require, and for the necessary fuel of all other persons then having and using right of common of turbary in and upon the common, every year, and at all times of the year, as occasion might require ; together with free ingress and egress, way, and passage for them and every of them, and with their horses, carts, and carriages, to have and take such necessary fuel, and to have and use their said right of common of turbary in and upon all the residue of the common, at all times, as occasion might require ; by means whereof, and by force of the statute in such case made, and notwithstanding any thing by the defendants in their 2nd plea alleged, the plaintiff, before the time when, &c. became, and then was, and from thenceforth had been, and still was seised in his demesne as of fee, of and in the close in which, &c. with the appurtenances in severalty by itself, and divided from the residue of the common ; and he being so seised thereof, the defendants at the said time when, &c. of their own wrong committed the said several trespasses. The plaintiff replied to the 3rd plea of common *of pasture, the same conveyance of the close, and his seisin and approver thereof ; and he averred, that in approving the said close in which, &c. he then left, and there did then remain in the residue of the common, sufficient common of pasture for all commonable cattle levant and couchant on the said customary tenement, every year, and at all times of the year, as occasion might require, and for all the commonable cattle of all other persons whatsoever having and using right of common of pasture in and upon the said common, every year, and at all times of the year, as occasion might require, together with free ingress, egress, way, and passage, for them and every of them, and their and every of their commonable cattle, to have and use their right of common of pasture in and upon the residue of the common at all times as occasion might re-

GRANT
v.
GUNNER.

quire; whereby he became seised in severalty, (as in the former replication;) and that the defendants of their own wrong committed the said several trespasses.

The defendants demurred to the replication to the second plea, and rejoined to the replication to the third plea, traversing the sufficiency of the common of pasture, and ingress, &c. and tendered issue upon this fact.

The plaintiff joined in demurrer and issue. The issue was tried at the Winchester Lammas assizes, 1808, when a verdict was found for the plaintiff upon the sufficiency of the common of pasture, with one shilling damages.

Shepherd, Serjt. on a former day in this Term, argued in support of the demurrer:

The question, whether the lord hath a right to approve the wastes of his manor against common of turbary, is still *res integra*. There is no direct decision upon the subject, all the modern cases which touch on it, only decide that a right of turbary *will not preclude the lord from approving against common of pasture, where it has been the tenant's object to assert the latter right: and the plea of turbary has been only collateral. The lord had, by the common law, no right whatsoever to approve; his right is founded on the words of the Statute of Merton, which are, "Also because many great men of England, which have enfeoffed knights and their freeholders of small tenements in their great manors, have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient pasture, as much as belongeth to their tenements; it is provided and granted, that whenever such feoffees do bring an assize of novel disseisin for their common of pasture, and it is known before the justicers, that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenement unto the pasture; then let them be contented therewith, and they on whom it was complained shall go quit of as much as they have made their profit of their lands, wastes, woods, and pastures." It is manifest from the expression "It is provided and granted," that before this statute the

[*439]

GRANT
v.
GUNNER.

[*440]

lord had no right to approve at all. The Statute of Westminster the Second, 13 Ed. I. c. 46, after reciting "that by the Statute of Merton it was granted that lords might approve, notwithstanding the contradiction of their tenants," and "forasmuch as no mention was made between neighbour and neighbours, many lords of wastes, woods, and pastures, had been hindered theretofore by the contradiction of neighbours, having sufficient pasture," orders, "that the Statute of Merton, provided between the lord and his tenant, thenceforth should hold place between lords of wastes, woods, and pastures, and their neighbours, saving sufficient pasture to their *tenants and neighbours, so that the lords of such wastes, woods, and pastures, may make approvement of the residue." It is difficult for the plaintiff to contend that these statutes were made in affirmance of the common law, when the latter recites that lords were hindered from approving against neighbours, forasmuch as in the former statute no mention was made of that case. Therefore it must be concluded that these statutes first gave the right to approve: and if so, then it is clear that the only right which they create is to approve against common of pasture. In the 2 Inst. 87, Lord Coke says, "Throughout all this statute, (of Merton,) pasture and *communia pasturæ* is named; so as this statute of approvments doth not extend to common of piscary, of turbary, of estovers, or the like;" and in p. 85, "*Quod commodum suum facere non potuerunt*. Hereby it appeareth that the lord could not approve by the order of the common law, because the common issued out of the whole waste, and of every part thereof; and yet see Tr. 6 Hen. III. where the lord approved two acres; and left sufficient, the tenant brought an assize, and the special matter being found, the plaintiff *retraxit se*." But whether the right to approve subsisted at common law or not, it was merely the right to approve against common of pasture, not against estovers, piscary, or turbary. For if these statutes were made in affirmance of the common law, it must be inferred that they together declare all the rights which the lord had; for it being found that the first statute had not sufficiently declared them, the second was made fifty years afterwards to supply the deficiency; yet the latter extended only to the right of approver against common of pasture. It is laid

down in several cases that the lord had no right to approve at all before these statutes. 1 Siderf. 106, *Geo v. Cother*. Case by a commoner for digging pits, and spreading gravel upon the waste, by which he lost his *common. The defendant pleaded that he was lord of the soil, and dug for coals, doing as little damage as possible, and leaving sufficient pasture. WYNDHAM, J. held that the lord could not dig pits in the common, into which, perhaps, the beasts of the commoner might fall; for the statute intended another manner of approver, namely, by inclosure; and he said that before this statute the lord could not approve at all. In the case of *Fawcett v. Strickland*, Willes, 57, S. C. Comyn, 578, though the tenant was wrong, because he pulled down the lord's fences in order to exercise his common of pasture, WILLES, Ch. J. and the Court, were clearly of opinion that the lord could not approve against common of turbary. WILLES there says, "The common of turbary is quite out of the case. For though a lord cannot by virtue of the Statute of Merton inclose and approve against common of turbary, yet where there is common of turbary, and common of pasture in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights. But if indeed by such inclosure this common (of piscary,) or their common of estovers, were affected, or they were interrupted in the enjoyment of either of these rights, they might certainly bring their action, and the lord, to be sure, could not justify such inclosure in prejudice of these rights. And so may the plaintiff in the present case, if he be interrupted in his right of turbary: but by his present action he does not complain of any such interruption, nor does he insist upon any such matter in his replication," which was, a prescription in right of a certain messuage and 40 acres of land, for common of pasture on Blewcaster common, for all commonable cattle levant and couchant upon the same tenements, and also (in the same replication,) common of turbary in the said waste, for his necessary fuel to be burnt and consumed *in the said messuage, as appurtenant thereto, and that the plaintiff put his cattle, levant and couchant, on his tenements, into that part of the waste so inclosed, to eat the grass there growing, and to use his common of pasture, and that the defen-

GRANT
v.
GUNNER.

[*441]

[*442]

GRANT
T.
GUNNEB.

dants of their own wrong chased them out. Here the replication did not maintain the action, because it did not prove any injury to have been done in driving out the plaintiff's commonable cattle, and the Court gave judgment on the demurrer for the defendant. The case of *Shakespear v. Peppin*, 6 T. R. 741,† was decided upon the authority of *Fawcett v. Strickland*. That was replevin, and avowry that the place where, was inclosed and separated from Walton Common, and was the defendant's freehold. The plaintiff pleaded his common of pasture in right of a customary tenement. The replication stated an approver, leaving sufficient common of pasture. The plaintiff rejoined a custom to dig sand in the common, as common of pasture there; and the defendant surrejoined, that there was sufficient sand left: the plaintiff generally demurred. The judgment was for the defendant, as it seems, because the rejoinder was held a departure from the plea: for this is a plain proof that the Court did not consider that the lord could approve against common of turbary, that if they had, they must have said, whether the plaintiff claims common of turbary or common of pasture, since it is admitted by the pleadings that sufficient of both is left, he cannot have his action. But WILLES, Ch. J. anxiously distinguishes between the two, that he may prevent the inference that the lord could approve against right of turbary. In 2 Inst. 474, Lord Coke says, indeed, that "by the common law the lord might always approve against any that had common appendant," and in the case of *Proctor v. Mallorie*, 1 Ro. Rep. 365, the Statute of Merton is said to be only in affirmance of the common law: but it is not to be discovered by the report of that case, how

[*418] the *point arose, and it seems to be an extrajudicial discussion. The proof there given, namely, that the writ of admeasurement, *quod habet plura animalia quam debeat* in respect of his frank tenement, lay at common law, is not conclusive; for it does not follow that the writ must necessarily be sued out only for the purpose of the lord's approver: it might lie for lord or tenant, for the benefit of that tenant, or of all, against any other tenant who disproportionately overstocked. No case is now extant in which it has been held that the lord might approve at common law;

† 3 R. R. 330.

GRANT
v.
GUNNER.

the two statutes afford a presumption that he could not; and if not, it is quite clear he cannot now do it. But if those statutes were only in affirmance of the common law, still they give no approver against common of turbary. An argument against the reasonableness of the approver contended for, is to be found in the nature of these respective common rights. Common of pasture is of a thing annually renewing. The number of acres which will afford in one year sufficient pasture for the tenants' cattle, levant and couchant on a particular tenement, will, *communibus annis*, afford sufficient for the same quantity of cattle in all subsequent times, so that if a sufficiency of pasture be left at the time of the approver, (the fertility of the tenements remaining the same,) it will always be a sufficiency. But turbary is an annihilation of the subject-matter. If peat renews, which certainly does not take place in all instances, and it is doubtful whether it does in any, it renews too slowly to repair the necessary consumption.

Lens, Serjt. contra :

The arguments that have been adduced tend only to shew that the lord's right to approve has not yet been determined. But from the nature of the thing and the analogy of the law, it appears that there is equally the same right to approve in the one case and in the other. WILLES, Ch. J. intimates that the right subsists, *if properly exercised; for he says, "the lord, to be sure, in such case could not inclose in prejudice of those rights; and so may the plaintiff in the present case, (*Fawcett v. Strickland*,) bring his action, if he be interrupted in the enjoyment of his common of turbary : " that is, if either his pasture or his turbary be injured by the approver, he may in either case equally bring his action. It is very strongly to be inferred from that case that the right of turbary does not render the inclosure unlawful. No authority stated proves that there was no approver at common law. It is true that approver cannot be exercised by virtue of the Statute of Merton, in any case but in that of pasture; but though that statute first provided, that if a sufficiency were not left, the approvement should be apportioned by the discretion and oath of the assize, 7 Ed. III. 67, before which, the whole must have been laid open, if enough pasture

[*444]

GRANT
v.
GUNNER.

[*445]

had not been left, it does not at all follow that there was no approver in any other cases, or before that statute. Lord Coke, 2 Inst. 87, refers to the case in Tr. 6 Hen. III. as a decision that there was approver at common law; and† in *Proctor v. Mallorie*, he says, “for so are divers cases *in the reign of Hen. III. which was before the statutes, and this appears by the writ *quod permittat habere tantam pasturam*: and Lord Bacon, Chancellor, particularly agreed with him in all that he said.” The expression in 2 Inst. 87, is not adverse to this position; for Lord Coke is there speaking only of the Statute of Merton, F. N. B. 4to ed. 287, *Quod permittat*, H. “And the rule in the register is, that the writ of *quod permittat* lieth of common of pasture, turbary, piscary, and reasonable estovers.” In 2 Wils. 59, *Cope v. Marshall*, it is said *arguendo* that approver was by common law. The cases of *Fawcett v. Strickland*, and *Shakespear v. Peppin*, although they only incidentally touched the point, generated an opinion in the profession that the right of approver was by the common law, and it is so laid down by BULLER, J. in 2 T. R. 392,

† So Sir Anthony Fitzherbert, Ch. J. in his reading on the statute *Extentamanerii*, entitled *Surueyenge*. edit. 1767, p. 8, “*Quot campi sunt in dominico*; it must nedes be taken of feldes, that be in tyllage or plowing, but it wolde be understande, whether the demeyne landes lye in the commyn feldes among other mens landes, or in the feldes by themself. . . . Wherefore the acres are to be praysed accordyng; and if they be great flattes or furlonges in the common fieldes, it is at the lordes pleasure to enclose them, and keep them in tillage or pasture, so that no nother man have commyn therein.”

And again, p. 16. “As for all errable landes, medowes, leise, and pastures, the lordes may improue themself by course of the common law; for the statute speketh nothing but of waste groundes.”

And again, p. 19. “So it was of oldetymethat all the landes, medowes, and pastures, lay open and unclosed. And

than was theyr tenementes moche better cheape than they be now, for the most part of the lordes haue enclosed theyr demeyn landes, and meadowes, and kepe them in seueraltie, so that theyr tenauntes haue no commyn with them therein.” (Which implies that they intercommoned over all the demesnes, so long as they lay open.) And afterwards, “Moores, hethes, and wastes, go in lyke manner as the herbage of the townes, for the lord’s tenantes have commyn in all suche out groundes with their cattel, &c.” From these passages it seems that before the inclosure of such demesne lands, the tenants must have had common appendant over such demesne lands, as well as over the rest of the open lands, meadows, and pastures of the township in which they lay interspersed, but that nevertheless the lord might at all times by common law approve his demesnes against this species of common.

n. Duberley v. Page. It is plain, since the tenant's right is a qualified right, and consists in a mere permission to take his profit, that all other uses of the land which do not interfere therewith, are still preserved to the lord. As to the distinction between the nature of turbary and pasture, that species of turf which consists of the roots of heath and grass, and the other vegetables which grow on the surface, is well known to renew within a very few years, and the peat *also renews, though slowly. But it is unnecessary to consider that, for the question upon an approvement always is, whether there were a sufficiency left at the time of the approvement made; for the tenant must declare upon the actual injury done to himself. 8 Ed. III. 39. Without considering whether the supply will be perpetual, if to a common intent, and common apprehension, sufficient is left at the time of the approvement, that is enough. If the sufficiency were disputed, the defendants should have taken issue on it, but they have admitted upon the pleadings, the sufficiency to satisfy their rights such as they are in relation to this tenement.

GRANT
v.
GUNNER.

[*446]

(CHAMBRE, J. observed, that the value of turbary chiefly depended upon its contiguity to the messuage, not on the sufficiency of quantity, and that circumstance rendered it extremely improbable that the common law should make the right of approver against turbary to depend on the sufficiency.)

If the contiguity is destroyed, that is evidence to support the issue of insufficiency. But the value of pasture, also, in great measure depends upon the contiguity. If the pasture left is so distant from the tenant's lands that he is damnified, that would be evidence to shew, that, as to him, there was not a sufficiency left.

Shepherd, Serjt. in reply :

There can be no approver against turbary, because there is no measure by which to try the sufficiency of what is left. If the tenant were not left destitute of fuel for the present winter, a jury must find a present sufficiency: but if the inclosure left none for the next winter, it would nevertheless be an absolute

GRANT
v.
GUNNER.

destruction of the right, not indeed as it was to be exercised at the moment, but of the right as it was to be exercised for ever after. So, in common of piscary, a partial inclosure would destroy the right, for the commoner could not draw his net. As to the *quod permittat*, the existence of a remedy for the tenant, if he is injured, does not at all indicate the extent of his rights.

[*447]

*It is not to be inferred from the language of WILLES, Ch. J. that he thought there was a right to approve against turbary. On the contrary, he says, that "probably their common of estovers may be the better for such inclosure," which clearly contemplates the tenant's entry to take the wood, notwithstanding the inclosure. His meaning is, that the act of the lord is not to be complained of, unless it be in derogation of the tenant's profit; but here, the lord asserts his right to derogate, so as he leaves sufficient: and of the sufficiency no measure can be assigned.

LAWRENCE, J. :

At common law the lord might perhaps inclose against common appendant, which was not an express grant, but was exercised where the lord granted arable land to be held of himself: but it does not follow that he could approve against his own grant. Now must not common of turbary necessarily be by grant?

(MANSFIELD, Ch. J. *acc.*)

Then Lord Coke's expressions are reconciled. If there be common of turbary by grant, to issue out of all and every part of the waste, the lord cannot, to be sure, in derogation of his own grant, approve against the right of turbary.

Cur. adv. vult.

Lens on this day prayed that the case might be again argued by *Williams*, Serjt. for the plaintiff.

MANSFIELD, Ch. J. :

We should be happy to hear it argued again if there were any hope of new light being introduced upon the subject: but no case since the Statute of Merton is to be found, in which it has

been held that the lord may approve against the right of common of turbary. If the law be not against the approver, all the reasoning in the case of *Fawcett v. Strickland* is *absurd. Chief Baron COMYN, and all the books, recognize Lord Coke's doctrine without a doubt. *Shakespear v. Peppin* recognizes the authority of *Fawcett v. Strickland*, and that case, throughout the whole argument, takes it for granted that the law is so. The universally received opinion of the profession, ever since I have been in the law, has been, that there can be no approver against common of turbary. The argument for the defendant is a very strong one, that pasture is a thing annually renewing, and that turbary is not. The turf which is used in the neighbourhood from which this case comes, is the surface of the common, pared off with the heath. As to peat, the substance of morasses, which is in some places called turf, there may be a vast quantity in a moor, at a distance from home, and a smaller quantity near home; and it might be very convenient for the lord to inclose that part of the land which lies nearer home; but it would be monstrous, if the lord could compel his tenants to go to a great distance, perhaps to the other side of the mountain, to fetch home their fuel. But it is said the right to approve against common of turbary may subsist with the limitation of leaving both fuel enough and conveniently situated. No one ever heard of a plea that the lord had left pasture, not only sufficient, but equally convenient, nor is it necessary so to plead it. What Lord Coke says of approving at common law against common appendant, is only applicable to common of pasture.

GRANT
v.
GUNNER.
[*448]

HEATH, J. :

On this side of Westminster Hall the law has always been so considered; and during the time I was at the bar, I have given opinions to that effect.

Williams, disclaiming the hope of adducing any authorities to the contrary effect,

[449]

Judgment was given for the defendant.†

† Acc. Fitzherbert. Surueyenge,
17. "Item, inquirend. est utrum
dominus de residuo boscorum pre-

dictorum forinsicorum dare possit,
et quantum valet talis donatio vel
venditio per annum. It is also to

1809.
Feb. 9.

[450]

URQUHART v. BARNARD.

(1 Taunt. 450—457.)

If a ship has liberty to touch at a port, it is no deviation to take in merchandize during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there.

If liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch for a purpose of trade, it shall be intended as a liberty to touch for that purpose.

THIS was an action upon an insurance, made on goods from Madeira to Santos, with liberty to touch at the Cape de Verd islands. The cause was tried before Mansfield, Ch. J. at the Guildhall sittings after last Trinity Term, upon admissions, which stated that the plaintiff had effected a former policy to the amount of 1,400*l.* upon the ship *De Sangano*, and 300*l.* on her cargo, at and from Lisbon to Madeira and Santos in South America, with liberty to change the property at Madeira; that Camacho, Belford & Co., the owners, by a letter written from Lisbon and addressed to the plaintiff, had requested him to “alter the insurance effected on the *De Sangano*, instead of

be enquired, Whether the lordes may gyve or selle the residue of his forren woodes aforesayed, and what suche gyfte or sale is worth by the yere. This letter is playne enough, and as me semeth no doubte but the lord may giue or selle the residue of the sayde woddres or wastes. Except that a manne haue commen of estovers. But what that gyft or sale is worth is to be understand and knowen, and as me semeth the dones or the byour shall be in lyke cause as the lord should haue ben, if he had not gyven it nor sold it. Than the lord hath improued himself of as moche woddres and wastes as he can lawfully, and when he hath gyuen or sold the resydue of that, he cannot improue himself of it. In like maner the donee nor the byoure can nat improue them selfe of any part thereof. For they can nat be

in no better case than he of whom they had it.”

And in p. 15, speaking of approver under the Statute of Merton, he says, “Commen in gross is, where the lord hath granted by his dede commen of pasture to a straunger. Nowe the lord may nat improue hymself of any parcell, for it is contrary to his graunt, though there be sufficient of commen.” And in p. 21, “Moore, hethes, and wastes, go in lyke manner as the herbage of the townes, for the lordes tenauntes haue commen in all such out groundes with their cattel, but they shall haue no wodde, thornes, turues, gorse, ferne, and such other, but by custom, or els special words in his chartour.” So that this author must have considered turbary to come within the reason of common in gross.

URQUHART
v.
BAERNARD.

Madeira to Santos, Madeira, the Cape de Verd islands, where she would take salt, and Santos, to the same amount on the brig, and to the amount of 1,500*l.* on goods." In consequence of this letter the plaintiff procured to be indorsed on the policy a memorandum, by which, "in consideration of one guinea per cent., the underwriters who signed it, agreed to permit the vessel to touch at one port in the Cape de Verd Islands, to take in salt." The plaintiff also, soon after, effected the further policy, upon which this action was brought, for 1,200*l.* on goods by the *De Sangano* at and from Madeira to Santos, with liberty to touch at the Cape de Verd islands. The policy also contained liberty to touch and stay at any ports or places whatsoever without being deemed a deviation. The loss, the plaintiff's interest, and the defendant's subscription of the policy, were admitted. The ship sailed from Lisbon, and took in an additional cargo at Madeira, from whence she sailed, bound for Santos. In the course of the voyage *she touched at Bona Vista, one of the Cape de Verd islands, where she remained several days, and loaded a considerable quantity of salt there as merchandize. The defendant contended that this was equivalent to a general trading, and was therefore a deviation, which increased the risk and avoided the policy; for that though the memorandum indorsed on the former policy gave liberty to touch and take in salt, the policy now sued on gave only liberty to touch, not to touch and trade. A witness proved, and the jury especially found, that the letter above mentioned was communicated to the agent, who signed the policy for the defendant. It was contended that this letter was not admissible evidence, but MANSFIELD, Ch. J. received it, and a verdict was found for the plaintiff, with liberty to move to set it aside, and to enter a nonsuit.

[*451]

Accordingly, *Best*, Serjt. having in Michaelmas Term last obtained a rule *nisi*, [the rule was argued, and the Court took time to consider:]

MANSFIELD, Ch. J. now delivered the opinion of the Court :

[455]

After recapitulating the facts of the case, he observed: The question which has been made, both at the trial and upon the argument, is simply this, Whether the ship having liberty to

URQUHART
v.
BARNARD.

touch at the Cape de Verd islands, without any reason assigned for it in the policy, the staying there a little time, and taking in this salt, without any proof that the loss was at all occasioned thereby, is to be considered as a trading which vacates the policy, because, as it is said, the memorandum gave only liberty to touch, not to touch and trade? It is doubtful, nor can I find it any where defined, what is the precise meaning of "liberty to touch," as contradistinguished from the meaning of "liberty to touch and stay." No case decides this difficulty, though there must be some difference between the two phrases: but the time of staying in both instances is perfectly undefined; and no case decides how long, or for what purposes, a ship may stay under the licence of these clauses. I have been always extremely averse to receive parol evidence to vary or explain a written contract; but under the circumstances of this case the Court is of opinion that the letter was admissible evidence; and that it explains the word "touch"; and since it was communicated to the underwriters, they must have known for what purpose this word was introduced into the policy. They must have known that the ship was to trade there, and that the policy contemplated this act. It was assumed in the *course of the argument, that the taking in salt was equivalent to a general trading: but that is not so; for the purposes of a general trading, it might have been necessary to unload all the cargo, and consume much time: it does not necessarily follow that much time was consumed in taking in salt. It is not therefore to be concluded that the "liberty to touch," authorizes a general trading. Among the cases on this subject, which are all collected in Park, 6th ed. 388, is that of *Stitt v. Wardell*,† which has been cited in the argument. Lord KENYON does not there at all define what is the meaning of the "liberty to touch and stay," but expresses his opinion that if that breaking bulk had happened at Cork, where the ship was entitled to touch, instead of in Dublin harbour, the policy would equally have been avoided. But as this was a sudden answer to a sudden question put by the plaintiff's counsel, what would have happened if the ship had gone into Cork, it is not a comment entitled to have

[*456]

† 2 Esp. 609.

much weight, as an explanation of the term "liberty to touch and stay." I wish his Lordship had more fully considered it. In the case of *Gregory v. Christie*, B. R. Trin. 24 Geo. III. Park, 67, Lord MANSFIELD, Ch. J. says, "the policy in question differs from others; because it contains a permission to trade, as well as to touch and stay, at any ports or places, which is not usual in policies of this nature; for in general they only permit them to touch and stay, which words can only be intended to give a permission so to do if necessity obliges them." This cannot be the true construction. The clause is not required for that purpose; for every ship, without any memorandum for that purpose, has liberty to do what is necessary, in order for the preservation of the vessel and the lives of those on board her; as to take in provisions to save the crew from starving, or to prevent her from sinking by going into port to be repaired. Such acts, though done without the sanction of these *words, are no deviation. I know not who was the author of that note, and perhaps it may have been incorrectly taken. The meaning of these words then has never been defined. It was truly said, that if a general custom had been proved, for ships from Madeira to Santos to call at the Cape de Verd islands, to take in salt, it would have been a sufficient answer to the objection which imputes a deviation. And upon what principle? Because, if the underwriters know by the general custom of the trade, that the touching at those islands is for the purpose of taking in salt, the assured are entitled to do it. If then the underwriter knows the same thing by means of an express communication of the purpose of touching, which is in this instance proved to have been made, it is the same thing as if he had notice by the general usage of the trade. He knows then by this letter that the ship was to go to the Cape de Verd for salt. The letter is not made use of to vary, or contradict the policy; it only shews that the underwriters knew the purpose of going there; it therefore shews that there was no deviation from the course of the voyage intended and insured; and this construction is not at all inconsistent with any decided case. I do not go into the merits. No doubt the difficulty arose from a want of precision in the broker. He thought the first policy was sufficiently

URQUHART
v.
BARNARD.

[*457]

URQUHART
v.
BARNARD. cleared up by the indorsed memorandum, and that after the communication to the underwriters, the other policy would have the same effect.

Rule discharged.

1809.

Feb. 9.

[458]

ELMORE v. STONE.†

(1 Taunt. 458—461.)

If a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the Statute of Frauds.

It is no objection to a constructive delivery of goods, that it is made by words, parcel of the parol contract of sale.

THIS was an action brought to recover the price of two horses, which it was contended had been sold to the defendant. The declaration contained one count, upon a bargain and sale, and another upon a sale and delivery. Upon the trial of this cause at the Middlesex sittings in Trinity Term last, before Mansfield, Ch. J., it appeared that the plaintiff, who kept a livery stable, and dealt in horses, having demanded 180 guineas for these, the defendant after offering a less price, which was rejected, at length sent word that “the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him.” The plaintiff, upon this, removed them out of his sale stable into another stable. *Lens*, Serjt. for the defendant contended, that as this was a bargain and sale of goods of greater value than 10*l.* a note in writing was necessary to be proved, because there was no sufficient delivery. Such a constructive delivery as this, would not avail, he said, to take the case out of the statute. MANSFIELD, Ch. J. was of opinion that there was a sufficient delivery, but reserved the point; and the jury found a verdict for the plaintiff.

On the following day *Lens* obtained a rule *nisi* to set aside the

† This case has been questioned in some subsequent cases (*Howe v. Palmer* (1820) 3 B. & Ald. 321; *Proctor v. Jones* (1826) 2 Car. & P. 532). But, having regard to the current of more recent judgments, the

case is still to be regarded as an authority. See *Marvin v. Wallis* (1856) 6 E. & B. 726, 25 L. J. Q. B. 369; *Castle v. Swoorder* (1861) 6 H. & N. 828, 30 L. J. Ex. 310.—R. C.

verdict and enter a nonsuit, upon the objection above-mentioned. And on a subsequent day in the same term

ELMORE
v.
STONE.

Best, Serjt. shewed cause :

He contended, 1st, that the transfer of the horses from the stable where the plaintiff's horses were exposed to sale, and where these at first stood, to a livery stable, where they stood at the expense and risk of the defendant, was equivalent to an actual *delivery. He might after that time have maintained trover for them, and if he had died, they would have belonged to his executors. The delivery was complete, so far as any delivery was capable of taking place, consistently with the disposition the defendant chose to make of them. 2. If this was not an actual delivery, it is one of those cases to which the Statute of Frauds does not apply, because an actual delivery is impossible : no delivery was intended, or could be made here, without defeating the defendant's purpose of keeping the horses at livery with the plaintiff, and therefore none was necessary.

[*459]

Lens, contrà.

The statute, in requiring a delivery, intended that there should be some distinct substantive act, independent of the bargain, and capable of proof, to corroborate the parol account of the bargain. But there is nothing here distinct from the parol contract, to confirm it, and the only evidence of the delivery is found in the terms of the contract itself. In the cases of a sale of heavy goods in a warehouse, or of hay, or the like, it has indeed been held that corporal delivery is not necessary, but that the delivery of the key, or other symbolical or constructive delivery, is sufficient. *Chaplin v. Rogers*, 1 East, 194.† But nothing here has been done towards a delivery, except the request that the horses might stand at livery, therefore the whole still rests in parol. It might with equal propriety be contended, that in the common occurrence, where goods are ordered in a shop, and left till called for, that is a delivery.

(HEATH, J. observed, that if the goods were weighed out, or measured, that would be a sufficient delivery.)

† 6 R. R. 249.

ELMORE
v.
STONE.

[*460]

The second argument resolved itself into the first. If goods are not capable of an actual delivery, a constructive delivery is sufficient. But in the present case there is neither an actual nor a constructive delivery. It is material that the defendant *never rode the horses, nor exercised over them any one act of ownership; nor has any act whatever been done to confirm the bargain, since it was made.

Cur. adv. vult.

MANSFIELD, Ch. J. now delivered judgment :

The objection made to this verdict was the want of a memorandum in writing of the sale, and of a delivery. I thought at the trial that there was no need of a memorandum in writing, because of the direction given, that the horses should stand at livery. They were in fact put into another stable, but that is wholly immaterial. It was afterwards argued that this was not a sufficient delivery, but upon consideration we think that the horses were completely the horses of the defendant, and that when they stood at the plaintiff's stables, they were in effect in the defendant's possession. There are many cases of constructive delivery, where the price of goods may be recovered on a count for goods sold and delivered, instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is, that the key of the warehouse is delivered, or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place. Thus in the present case, after the defendant had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery at the vendor's stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses, but as any other livery stable keeper might have them to keep. Under many events it might appear hard, if the plaintiff should not continue to have a lien upon the horses which were in his own *possession, so long as the price remained unpaid ; but it was for him to consider that, before he made his

[*461]

agreement. After he had assented to keep the horses at livery, they would, on the decease of the plaintiff, have become general assets: and so, if he had become bankrupt, they would have gone to his assignees. The defendant could not have retained them, although he had not received the price. Consequently the rule must be

ELMORE
v.
STONE.

Discharged.

WARD v. WELLS.

(1 Taunt. 461—462.)

1809.
Feb. 9.

[461]

If a witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an English port by contrary winds, just at the time of the trial.

THIS was an action brought upon a promissory note. Upon the trial before Mansfield, Ch. J. at the sittings at Westminster, in this Term, it appeared that the note had been attested by a person named Collins, the son of a man of fortune, who had been residing for a while in the house of the plaintiff's attorney, and in the course of that residence had attested this note in his presence. The attorney swore that he had enquired for him in many places within a year past, and could not hear of him. Another witness stated, that four days before the trial he enquired for Collins at the house of his father, and was informed by his elder brother, that he believed him to be in Spain, as he had set out for that country about two months before, and had not yet returned. *Vaughan*, Serjt. for the defendant, contending that the absence of the attesting witness was not yet sufficiently accounted for, the father of Collins was called, who stated that he had received a letter from his son, dated six days before the trial, from Falmouth, informing him that his vessel had sailed for Spain, but had been driven back by stress of weather; he expected however to sail again immediately: at the time of the inquiries *above mentioned, the elder brother had not been apprised of the receipt of this letter. MANSFIELD, Ch. J. permitted the note to be read, and refused to reserve the point. The plaintiff obtained a verdict.

[*462]

WARD
v.
WELLS.

Vaughan now moved that the verdict might be set aside and a nonsuit entered, or that a new trial might be had. *Prince v. Blackburn*, 2 East, 250, was the first case in which the old rule was relaxed, and perhaps that case went too far, but in the present instance the witness was within the reach of process.

The COURT mentioned the case of *Crosby v. Percy*, 1 Taunton 364, and held, that if the circumstance of a witness being abroad dispenses with the necessity of producing him, there was no pretence for the present motion. Unquestionably the plaintiff's attorney thought the attesting witness out of the reach of process, and as to all persons in England, he was in Spain. When the previous inquiries were made, the elder brother did not know to the contrary, and the father did not at the time of the trial know that his son had not actually sailed again.

Rule refused.

GRANT v. PAXTON.

(1 Taunt. 463—476.)

1809.
Feb. 9.

[463]

A policy upon a homeward voyage from India, upon goods at and from a foreign port of loading, until the ship's arrival in London, beginning the adventure upon the said goods from the loading thereof at the foreign port of loading, and so to continue upon the goods, until the same should be discharged; was held to attach only on the particular cargo taken in at the first port of loading.

Though the insurance was, to all or any ports and places whatsoever beyond the Cape of Good Hope, in port, and at sea, in all places, at all times, and in all services, with liberty to proceed to, touch and stay at any ports or places whatsoever for any purpose whatsoever.

But upon an insurance on an India voyage out and home, the policy being equally extensive as that above stated, and containing the additional words, "and forwards and backwards at sea, until the ship's arrival at her last station of discharge," though it purported literally to be on the said goods, the Court held it must by necessary implication apply to all goods put on board in the course of the voyage.

Forwards and backwards means from port to port in the course of the voyage, not from Europe to Asia and from Asia to Europe.

Upon an insurance on an East India voyage, the underwriters are bound to know the course of the East India Company's charter-parties and trade, and that the ship's destination is liable to be changed after the policy is effected.

And if the company permit the voyage of a chartered ship to be altered, though it is at the request and partly for the benefit of the assured, the altered voyage continues protected by the policy.

THIS action was brought upon a policy effected upon goods, by the *Brunswick*, as interest might appear; to pay average upon each species of goods, at and from China to all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere beyond the Cape of Good Hope, in port, and at sea, in all places, at all times, and in all services, until the ship's safe arrival at London; with liberty to seek for, join, and exchange convoys; beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship at China, including the risk in craft from the shore to the ship, and to continue until the said ship, with all her ordnance, &c. and goods and merchandizes whatsoever, should be arrived at London, including the risk in craft from the ship to the shore, and upon the goods and merchandizes, until the same should be discharged, and safely landed; and it was

GRANT
v.
PAXTON.

[*464]

stipulated that it should be *lawful for the said ship, &c. in that voyage to proceed and sail to, and touch, and stay at any ports or places whatsoever, for any purpose whatsoever, without being deemed a deviation. The declaration averred that a large quantity of goods was loaded on board at China, to be carried on the voyage insured; that the ship sailed, and proceeded in the course of the said voyage to Bombay, and that while she was there, the said goods were unloaded and taken out of the ship, and in lieu thereof other goods, while the ship remained at Bombay in the course of the said voyage, were put on board her, to be carried on the further prosecution of the said voyage; that she afterwards sailed from Bombay in the further prosecution of the said voyage, and was captured with the said last mentioned goods on board. This cause was tried before Mansfield, Ch. J. and a special jury, at Guildhall, at the sittings after Trinity Term, 1807. The facts proved were, that the *Brunswick*, of which the plaintiff was part owner, had, in October, 1803, been chartered in the usual terms of the East India Company charter-parties, for a voyage to China and back, and on any other service whatsoever, as the said Company, or any of their governors, presidents, or agents, authorized thereto by the Court of Directors for the time being, or any committee of the Company, should require or direct: that the ship sailed from China, with a cargo of tea, some part of which belonged to the plaintiff, as his private adventure, and was the subject of this insurance. That she soon afterwards sprung a leak, which rendered it necessary for her to go into Bombay, where she delivered the undamaged part of the Company's goods to be carried to England on board of the *Worcester* and *Skelton Castle*, two ships which were then lying there: and the plaintiff, by permission of the Company, forwarded his private adventure towards England by the *Bridgewater*, and insured it for that voyage by a fresh policy, the underwriters upon which afterwards *paid him for a total loss sustained by the capture of that ship in the course of her homeward passage. When the *Brunswick* was repaired, the governor in council at Bombay, upon the application of the plaintiff, permitted her to return to the port of Canton in China for the purpose of receiving

[*465]

another cargo of tea on account of the Company, stipulating that the Company should not be charged with any expense on account of demurrage, deviation or detention, or other costs and charges whatever by reason of the *Brunswick* proceeding to China to take in another cargo, but the same should be in all respects, as if originally laden on board the same ship in the terms of the charter-party. The plaintiff loaded the *Brunswick* on his own account with cotton, and sailed for China; and upon this second voyage, the ship was, with her cargo, captured by a French squadron; and the principal object of this action was to recover as for a total loss upon that event. The only defence important to mention here was, that the second voyage from Bombay to China was not within the terms of the policy, which, it was contended, applied only to the goods first loaded on board in China, for that those goods were to be delivered in London; although power was given to sail with them any where; that the policy was satisfied by the protection of the same goods when they were shifted to the *Bridgewater*, and did not attach upon the goods put on board at Bombay. The plaintiff on the other hand contended that this was the common form of East India policies, and though the insurance was expressed to be from the loading of the said goods in China, till the delivery of the said goods at London, the usage and understanding of the trade was, that the risk should cover all the trading in the whole course of the voyage between the time of loading at Canton and the time of the ship's arrival in London. The plaintiffs referred to the case of *Grant v. Delacour*, which arose in *consequence of the loss of the same ship and cargo, but upon another policy. That was at and from London to "all parts and places on this side and on the other side of the Cape of Good Hope, forwards and backwards, at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge at Blackwall or Deptford, upon goods in the *Brunswick*, as interest might appear, beginning the adventure from the loading thereof on board the said ship at London, and so should continue until the said ship with all her ordnance and goods and merchandizes whatsoever, should be arrived as above, and back again at her last station of

GRANT
v.
PAXTON.

[*466]
GRANT
v.
DELACOUR.

GRANT
v.
DELA COUR.

discharge at Blackwall or Deptford. That cause was tried at the Guildhall sittings after Trinity Term, 1806, before Mansfield, Ch. J. The defence chiefly relied on, was, that the loss occurred, not upon a voyage performed in the service of the East India Company, but in a voyage undertaken by their permission indeed, as it appeared, but at the request, and for the sole benefit of the plaintiff. MANSFIELD, Ch. J. was there of opinion, that the policy extended to all voyages performed by the *Brunswick* under the Company's authority, for whose benefit soever they were undertaken, because the owner has no control over a ship during the time for which it was chartered in the East India Company's service; and the jury found a verdict for the plaintiff.

[*467]

"*Lens*, for the defendant, in the following Term obtained a rule *nisi* to set aside the verdict, and to have a new trial, upon the ground that there was no instance of such a retrograde voyage having taken place under an East India charter-party, and it therefore could not be, and was not within the contemplation of the parties to insure, and that notwithstanding the underwriters might be responsible upon any voyage performed by the orders of the Company, though unforeseen at the time of effecting the policy, yet that in this instance the interest *of the Company in the ship was suspended during the performance of this voyage. MANSFIELD, Ch. J. observed, that no particular voyage was in contemplation; the insurers engaged by this policy to protect the ship in any voyage which should be undertaken in that part of the world: this voyage had been undertaken lawfully, and was within the policy; and there was no difference between the direction and the permission of the East India Company; and he saw no reason to take the voyage out of the words of the policy. ROOKE, J. said, that if the insurers did not like to insure such voyages, they might except them in future policies. The case was argued on a subsequent day in that Term by

1806.
Nov. 26.

"*Shepherd* and *Best* for the plaintiffs, and *Lens* and *Bayley* for the defendants, and the Court

"*Discharged the rule.*"

GRANT
v.
PAXTON.

It was contended for the plaintiff, that that decision governed the principal case. But MANSFIELD, Ch. J. thought that the present policy attached only upon the specific goods shipped in China, upon the voyage from China to London, and directed a nonsuit, with liberty to move to enter a verdict for the plaintiff, if the Court should be of opinion that he ought to recover.

Best, Serjt. in the ensuing Michaelmas Term obtained a rule *nisi*, and the case was twice argued; first in Hilary Term, 1808, by *Bayley*, Serjt. for the defendant, and *Shepherd* and *Best*, Serjts. for the plaintiff, and again in Trinity Term in the same year by *Lens* and *Marshall*, Serjts. for the defendant, and *Shepherd* and *Best* for the plaintiff. The defendant's counsel first insisted, as they had done in the case cited, that this voyage was not covered by the policy, because it was not undertaken by the command and in the service of the East India Company; (but the Court clearly held that their former decision had put that question at rest; and that the only point here was, whether *this cargo was protected by the terms of the policy.) The defendant's counsel then distinguished this case from that of *Grant v. Delacour*. There the policy was on a voyage out and home, and upon goods of all sorts; and the parties necessarily intended to trade in the course of the voyage, and therefore contemplated a change of the goods; consequently the policy applied to all the goods that should be successively shipped in the course of the voyage, and the terms used were large enough to embrace every possible circumstance of cargo: therefore though every cargo of goods which was put on board within the compass of that voyage was held to be covered by the policy, no necessity requires the same construction to be applied to this, which differs so materially from the other, that the contrast makes that case a strong authority for the defendant. This is an insurance on a single definite voyage from China to London, and upon that voyage only was the premium calculated. The insurance attached on the specific goods purchased in China, and adhered to them till their loss or arrival at London, in whatever vessel they might come. [He also cited *Robertson v.*

[*468]

GRANT *French*, 4 East, 130 (7 R. R. 535), and *Hodgson v. Richardson*,
 v.
 PAXTON. 1 Bl. Rep. 463.]

- [470] For the plaintiff it was contended, that this cargo was within the scope of the policy. The underwriters are bound to know the usual conditions of the charter-parties made with the East India Company: according to the custom of their trade, intermediate voyages of this nature are to be expected, and the assured cannot foresee on what service, or in what voyage the ship will be employed; a change in her destination may render it expedient for him to shift his cargo, and take other goods on board. It is therefore his object to comprehend in his policy all cargoes that may be put on board at any time during the
- [471] voyage. * * *Grant v. Delacour* was determined upon the nature of the voyage, not on the expressions used in the policy; and this case must be decided upon the same principle. The only difference, even in form, between the two policies, is, that the former was upon a voyage out and home, and contained the words "forwards and backwards;" but they were not material to that decision. They are contained only in policies on voyages out and home, and merely mean once outwards and once homewards; that is, that the assured is to have the like liberty of deviation in returning from India as he had in going thither. They do not relate to any intermediate voyage, as Lord MANSFIELD, Ch. J. held in the case of *Gregory v. Christie*, 1 Park, 6th edit. 66. That was an insurance "from London to Madras and China, with liberty to touch, stay, and trade at any ports or places whatsoever." The ship was sent upon two intermediate voyages from Madras to Bengal for rice, and on the second voyage was lost. The liberty to touch, stay, and
- [*472] trade could not extend to places out of the course of *her voyage, and Lord MANSFIELD did not decide it upon those words, but upon the course and usage of the East India trade, which the underwriters are bound to notice. In that policy the words "forwards and backwards," were not contained. * * *

MANSFIELD, Ch. J. now delivered the opinion of the Court :

After stating the declaration and the facts of the case, he proceeded :—No reason was given, or at least none appeared upon the evidence, why the *Brunswick* did not proceed directly to London, and why the plaintiff did not reship his own goods for London on board of her. The fact only was proved, that the East India Company sent the *Brunswick* to Canton; not for their own benefit, but the plaintiff applied to them that he might go to Canton with an adventure of his own, and permission was granted him upon the terms that the Company should take in goods for themselves at Canton, but that they should pay no part of the freight on the outward voyage from Bombay thither. On this voyage the *Brunswick* was taken. The plaintiff first sued Delacour upon a policy effected on the whole voyage out and home; and in that cause *an argument was used with considerable effect, that the Company, who had been very indulgent to the plaintiff in permitting him to undertake this voyage, would probably have been less so, if they had considered the consequence; for they would thereby raise the price of insurance against themselves, since the underwriters would not hereafter insure at the usual premium, a voyage, which might, by the favour of the Company to the captain, be prolonged beyond the full end of the twelve months next after the time sufficient for the voyage which was first contemplated. But it was impossible not to say that the plaintiff must recover upon that policy. The words of it were most extensive. It was on goods, laden in London, and to continue on the same goods, which, literally taken, would be absurd, because goods are taken out for the purposes of trading and barter, not to be brought home again in specie. The policy was at and from London, to all parts and places on this side, and on the other side of the Cape of Good Hope, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge at Blackwall or Deptford, upon any kind of goods in the *Brunswick*, beginning the adventure upon the said goods from the loading thereof on board the said ship at London, and so should continue. The Court held that these words, though literally

GRANT
v.
PAXTON.
[473]

[*474]

GRANT
v.
PAXTON.

[*475]

applying only to the goods laden in London, must be intended to apply to any goods brought back to London, though they were not the same goods. Consequently, under that policy, the captain had a right to trade with his outfit, as often as he would, and the insurance attached upon any goods which he might acquire in the course of his trading, and endeavour to bring back to England. But in this case the words very materially differ. The policy is upon goods at and from China to all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or *elsewhere beyond the Cape of Good Hope, in port, and at sea, in all places, at all times, and in all services, until the ship's safe arrival at London, not at the last place of discharge, an expression which was in the former case relied on for the plaintiff, as indicating that the ship was to discharge her cargo more than once; beginning the adventure upon the said goods from the loading thereof on board the said ship at China, until the said ship, &c. and goods and merchandizes, &c. shall be arrived at London. Taking the words of this policy, nothing can be clearer, than that the goods insured by it are the goods to be put on board at China, and not elsewhere, on the voyage from China to London. But inasmuch as the Company may employ the ship, while under their hire, in any service, the words "to all or any places, in port and at sea, in all places, at all times, and in all services," are inserted, to the intent that although the ship should be used as a ship of war, or in whatsoever employment she might be, or whithersoever the Company should send her, still the policy should cover these goods. The Company, it is true, sent back the *Brunswick* on another voyage, but this circumstance does not alter the words of the policy, or enlarge the insurance. It might alter the effect of the policy, if there were any custom of the trade to warrant it; but not only none such is found, but it is disaffirmed by the very circumstances of this case, which shew that the turning out of these goods at Bombay was owing to the interposition of an extraordinary accident. It never was in the contemplation of the underwriters, or of any man, that a ship once laden with tea, a very valuable cargo, would be unloaded, and employed in war, or some other trade. If then there is no

custom of the trade, there is nothing to alter the plain, fair, grammatical sense of the words. In the other policy the words "backwards and forwards at sea," had considerable force. The plaintiff's counsel in this case *contended that according to a *dictum* of Lord MANSFIELD, those words meant only from Europe to Asia, and from Asia to Europe. But this is a most unnatural interpretation: the words "backwards and forwards at sea," must mean from port to port. It was said by Lord MANSFIELD in the case of *Gregory v. Christie*, that since the practice had ceased of insuring both the outward and homeward-bound voyage in one policy, the words "backwards and forwards" had ceased to be inserted, but in the case of *Salvador v. Hopkins*, 3 Burr. 1707, the insurance was "at and from Bengal, to any ports or places where and whatsoever in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival at London." There the words must have had the meaning attributed to them in *Grant v. Delacour*, that is, from port to port, not from Europe to Asia. This discussion no further concerns the present question, than to shew that the case of *Grant v. Delacour* does not govern this. The distinction between them is, that there, by necessary construction, all the goods, which might be acquired by trading in the course of the voyage, were protected by the policy: in this case the insurance is on nothing but the goods laden in China, and is to continue on them until the arrival of those goods at London. On the true construction of this instrument therefore, we must pronounce that the voyage from Bombay to Canton was not within the meaning of the policy, nor the lost goods covered by this insurance; consequently, the rule must be

GRANT
v.
PAXTON.

[*476]

Discharged.

1809.
Feb. 11.

ROBERTS v. KARR.†

(1 Taunt. 495—504.)

[495]

Abuttal in its strict sense includes the idea of contiguity. Abuttals are not in general to be construed strictly.

But if the description of abuttals be such, that, if correct, it might increase the value of the premises, and induce the purchaser to take the land on that account, the deed is not merely evidence that the land abuts according to the description, which may be answered by contrary evidence,

But it shall amount to a grant that the land abuts as it is described.

A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted in the broadest part on the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road and the premises granted. Held that the grantor and those claiming from him were concluded from preventing the grantee to come out into the road over this slip of land.

The Court will not grant a new trial on account of a verdict being against evidence, where the damages to be recovered would not exceed five pounds.

THIS was an action of trespass for breaking and entering the plaintiff's close, and destroying his fence, and two plants of ivy, there growing. There was also a count for an injury done to a wall of the plaintiff's in a different place, by inserting rafters into it. The defendant pleaded to the first cause of action several pleas, in none of which did he claim any interest in the place where the trespass was committed, and the only two pleas necessary to be mentioned were the fourth, stating a way of necessity, from a highway called East Lane, over the place in question to the defendant's dwelling-house; and the 5th, stating that a footway passed over the place in question. The cause was twice tried: first before Heath, J. at the Surrey Lammas assizes, 1807, when the issues upon both these pleas were found for the plaintiff, and all the other issues for the defendant; and again before Lord Ellenborough, Ch. J. at the Surrey Lammas assizes, 1808, when the first of these issues was found for the plaintiff, but the second, and the issue on the last count, for the defendant. The facts which appeared in evidence, were that Pratt, being

† Followed in *Espley v. Wilkes* (1872) L. R. 7 Ex. 298, 303, 41 L. J. Ex. 241, 26 L. T. 918; *Furness Ry. Co. v. Cumberland Co-op. Building Society* (1884) 52 L. T. 144; *Roe v. Siddons* (C. A. 1888) 22 Q. B. D. 224, 60 L. T. 345.—R. C.

the owner of a field, converted it to building ground, and laid out a street called East Lane, running from east to west, and another called Camden Street passing out of the former and running from south to north: at the angle formed by the intersection of the north side of East Lane with the *western side of Camden Street, he built a house the front of which faced southwards into East Lane and subtended forty-one feet six inches of the length of that lane: to this house was laid, at the back of it, a piece of ground for a garden, the entry to which was through the house, and which extended northwards in a direction parallel to Camden Street, and was bounded on the eastern side by a brick wall, not placed in the continued line of the eastern wall of the house, but in a line parallel to it, and situated four feet six inches further to the westward, so that the house projected four feet six inches more to the eastward than the wall of the garden: Pratt erected a row of posts in the continued line of the wall of the house, four feet six inches distant from the wall of the garden. A portion of the garden, at the northern end, was separated from the residue, by a wall running from east to west. In 1778 Pratt conveyed these premises to Compigné, by a lease and release, which described them as “a parcel of ground situate on the north side of East Lane, and abutting east on a new road leading from East Lane; and containing in front, from east to west, towards the said lane, forty-one feet six inches of assize, little more or less; and in depth backwards from north to south, one hundred and twenty-one feet of assize; and from east to west, at the back part thereof, thirty-six feet nine inches of assize; and the messuage built thereon,” with a reference to a plan annexed; “together with all ways.” There was sufficient land contained within the walls to satisfy this admeasurement. In 1790 Pratt demised to King, upon a building lease, some land lying next beyond Compigné’s land on the north, and then open to Camden Street, and described it as abutting and adjoining to the new road. Immediately after he had executed the lease, the parties made an agreement, in consequence of which Pratt inserted a covenant, by which, in consideration of three guineas, *he covenanted that King should, during his term, enjoy the strip of land lying under Compigné’s wall, for

ROBERTS
v.
KARR.

[*496]

[*497]

ROBERTS
v.
KARR.

the length of twenty feet from King's house to the southward, and thereupon he particularly marked this ground in the plan annexed to the deed, which contained a declaration that all the contents of the plan were intended to pass: and the deed thus interlined was re-executed and the money paid. This deed was not produced in evidence till the second trial. Upon the land thus demised King erected a house, the front of which faced to Camden Street, and stood in a line with Compigné's garden wall. Between thirty and forty other houses were erected in the same line, extending to the northward, and fronting into Camden Street, in front of most, or all of which the proprietors inclosed a small court of the depth of four feet six inches. King inclosed in front of his own house a similar court, and also the piece of ground granted him by the interlined covenant; and planted it, and kept it inclosed about eighteen years. About two years before the commencement of this action, Compigné demised to the defendant that part of his land which was divided from the residue at the northern end; and the defendant built a house on it fronting eastwards to Camden Street, and opened a door into that street, through the eastern wall of his inclosure, and in order to make the entrance to his house over the strip of land which King had inclosed, and which intercepted his access to his house on that side, he removed the fence of it, and committed the act complained of in the first count. The premises were then in the possession of the plaintiff, under a demise from King. Contradictory evidence was given as to the question, whether the strip of land lying along under the wall within the posts was in fact a footway or not? Some witnesses stated that it was, and that the posts erected by Pratt were placed *there to protect it from the carriages; and that persons had walked there. And a surveyor of the roads gave evidence that he had once caused the ground within the posts to be pared, as being a public footway; but on the second trial Pratt, being duly released, stated that he had originally intended to reserve that space of ground all along under the wall for the purpose of putting on it building materials, and had put up the posts to prevent nuisances; and it was also proved, that in the same year in which King built his house, Compigné, having occasion to open a door through the eastern

[*498]

wall of his garden into Camden Street, asked and obtained of Pratt permission to have a passage over this strip of land, into the road; and a doorway was accordingly made. Some other witnesses also stated that this land never was a part of the highway.

ROBERTS
v.
KARR.

Lord ELLENBOROUGH, Ch. J. upon the second trial, was of opinion, that if Compigné's land had been sold by Pratt expressly for the purpose of building a house thereon, there would have been a way of necessity: but it did not appear that such was the case: and he therefore thought that there was no such way: for clearly a man could not by his own act create a way of necessity: the question therefore was, whether there was a foot-way used by the public upon the strip of land in question. The word abutting did indeed, in its strict sense, imply contiguity; but it was not necessary that the contiguity should continue along the whole length of the land granted: the expression might be explained by evidence of the user of the premises; and as they abutted on the road for the length of the house, that satisfied the description. He thought that if the land had been dedicated to the public, it was equally the highway, whether the deed mentioned it to be such or not; and if it was not used as a highway, the deed would not make it such; and he *instanced

[*499]

Shepherd and Best, Serjts. for the plaintiff, in showing cause against the first rule for a new trial, and in support of the second rule, contended, that the deed was only evidence of the state of the land in question. * * But supposing that the description in the deed was more than evidence, and was of the nature of a grant, yet it was not necessary that, in order to satisfy this description, the land conveyed should abut on a *public road for the whole length of one hundred and twenty-one feet: if abuttal

[*500]

ROBERTS
C.
KARR.

did necessarily imply contiguity, still it was sufficient that any part of the premises abutted: and for a part of the length, namely, so far as the side of Compigné's house extended, the premises did in fact abut on the road. * * *

Vaughan, Serjt. for the defendant, in support of the first rule for a new trial, and in shewing cause against the last, contended that Pratt clearly must be deemed to have sold to Compigné all the land contiguous to Camden Street for the length of 121 feet, except such as was dedicated to the public service. Either the land in question, therefore, was included in this grant, so that the defendant's land extends to and abuts upon that which the plaintiff contends to be the highway, or the place in question is the highway, because it is that on which the lease grants that the defendant's land abuts. * * *

[501]

HEATH, J. in the course of the first argument observed, that abutments have never been construed very strictly; thus if premises be described as abutting on a house to the east, it may be the north-east or south-east.

LAWRENCE, J. observed, that the description might be an inducement to the party to buy the land, by causing him to suppose that it abutted on the new road for the whole length; as between the grantor and grantee, therefore, the soil in question must be taken to be dedicated to the public. If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?

MANSFIELD, Ch. J. observed, that there was no wall to define the boundary of the land granted to King, yet in both deeds the description was the same, with the mere addition of the word "adjoining," as well as abutting.

Cur. adv. vult.

MANSFIELD, Ch. J. now expressed the opinion of the Court:

[*502] In the former instance we granted a new trial, because we thought it ought to appear how these conflicting *rights stood

ROBERTS
F.
KARR.

upon the deeds on both sides, for upon them the rights of the parties depend. To judge by them only, there could be no doubt. But parol evidence was introduced to prove that the ground in question never was the highway. Pratt, however, the grantor, was himself the principal, though not quite the only witness, who stated this. And although releases were executed which rendered him competent, yet he surely came under such a bias as must render his evidence very doubtful of credit. He states that he always intended to reserve a piece of ground between the wall and the street to put scantlings and mortar on. That is an odd reason, but it is still more singular, that, he having the intention to reserve this piece of ground four feet wide between the wall and the street, should, in his lease to Compigné, describe the premises as forty-one feet six inches wide at the one end, and thirty-six feet nine inches wide at the other end, abutting on the road or street. When a grantor uses the particularity of describing land by feet and inches, is it not probable that he would describe it as abutting on this piece of ground if he had intended to reserve it? This is very dissimilar to the case put of a conveyance of a field described to abut on the road, made by a man who was not owner of the soil between the field and the road, as Pratt was here: it is true that many premises may be described as abutting on a road, although they abut on grass land lying between the fence of the close and the road; but all that space of land was the road before turnpikes came into use, and in common parlance it is still called the road: and I should much doubt, in a case where the lord of a manor should grant land by such a description, whether he could hinder the grantee from coming out of his close over that grass land to the road. I cannot help thinking, from the difference which subsists in the two leases of the word "adjoining," *which is added in the one, and the grant to King of this forecourt made by the interlined covenant, that Pratt about that time first conceived the idea of reserving this piece of land. It is true that Compigné asked permission to make a doorway through his wall to pass over this strip of ground to the road: but that was at a very early period in the formation of this street; and as he asked this permission, not having his lease in his hand to see what his rights

[*503]

ROBERTS
v.
KARR.

were, this does not very much bear upon the case. As to the fence erected by King, one of the witnesses spoke of the use of it, which was to prevent persons from committing any nuisance close to the plaintiff's house. But if a fence had been erected by the plaintiff for that purpose on the soil of another, it would have been a very ill-natured thing to have cut down that bar, and say that persons should commit nuisances close to his house: so that the circumstance of this fence affords very slight evidence of exclusive possession. As to the posts, they were of very little importance; for some witnesses said they were intended to keep off the carriages, and a road surveyor proved that he had pared the ground between the posts and the wall. But supposing that Pratt, which I do not believe, had in his mind the intent to reserve this land, he could not, consistently with what appears upon the face of these deeds, prevent the defendant from opening his door into the street; because he has described the defendant's land in his lease as thirty-six feet nine inches in breadth, and abutting on the street. If then he afterwards prohibits the defendant from coming there, is it not a sufficient answer to say, you have told me in your lease, "this land abuts on the road": you cannot now be allowed to say that the land on which it abuts is not the road. We are therefore of opinion that the verdict is right. The Judge who tried the cause has intimated an opinion, though not very strongly, in favour of the plaintiff, but he rested it chiefly on the other issue, on which there was evidence of the plaintiff's wall having been damaged to the amount of five pounds. But as to that issue, first, the Court will not grant a new trial for so trifling a sum as five pounds; and, secondly, it is only a question of judgment. No witness proved that the house of the plaintiff was the worse for it, or that any man would give five shillings the less for the house on that account: all the jurors had a view of the premises, and four of them were builders, and quite as good judges as that one witness, and as likely to be right.

[*504]

Rule discharged.

C. P. EASTER TERM.

BROWN v. TIERNEY.†

(1 Taunt. 517—518.)

1809.
April 22.

[517]

If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship while the vessel insured is lying in an open road, outside of a harbour, is not within the warranty.

THIS was an action upon a policy of insurance, effected upon the ship *Robert*, at and from Gottenburgh to her port of discharge in the Baltic, warranted free of capture or seizure in port or ports. Upon the trial of the cause at Guildhall, at the sittings after last Hilary Term, before Mansfield, Ch. J. it appeared that the vessel was bound for Pillaw; that there is a harbour at Pillaw, rendered difficult of access by a shifting bar, on which the water is too shallow to admit vessels deeply laden; that without the bar, and distant four or five miles from the custom-house, is a station called Pillaw Roads, where ships bound for Pillaw, which draw much water, usually bring to, and unload some part of their cargo, to lighten them sufficiently for passing the bar. The *Robert* came to an anchor in Pillaw Roads, and a pilot went on board her there, who would not permit any thing to be unloaded till the ship's papers had been examined and approved at the custom-house. The supercargo having gone on shore with the papers for this purpose, the vessel, while lying in the roads, was taken by a French privateer. The jury found a verdict for the plaintiff.

Shepherd, Serjt. now moved for a new trial, upon the ground that the underwriter was discharged by the warranty: the ship had arrived at the place where she *was to begin unloading, she had reached her port of discharge, and therefore must be considered as being in port. If a place of discharge is not to be considered as a port, many open roads, as at Deal, Hastings, and

[*518]

† The decisions on the warranty in these terms are not easy to reconcile. Compare *Levy v. Vaughan* (C. P. 1812) 4 Taunt. 387; *Levi v. Allnutt*, (K. B. 1812) 15 East, 267; *Dalglish v. Brooke* (K. B. 1812) 15 East, 295. —R. C.

BROWN
v.
TIERNEY.

other places, must be excluded from the denomination of a port. The distance from the custom-house, at which the ship lies, is immaterial, nor can it differ the case, that the papers had not yet been approved at the custom-house.

The COURT held that the meaning of the warranty was, that for whatever purpose the ship went into a port, if the enemy got down to the port by land and took her, the underwriter in that event should be discharged. But in this case the ship was as much at open sea as ever she had been : nor was it proved to be ever the practice wholly to discharge a ship in Pillaw Roads, but only to lighten her sufficiently to enable her to enter the harbour ; and they

Refused the rule.

1809.
May 1.

CHURCHILL v. EVANS.

(1 Taunt. 529—536.)

[529]

If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other.

But if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other ; whether either one is bound to guard against casual damage, which during, and by the fair enjoyment of his right, may happen to the other—*Quære. Semb. acc. per LAWRENCE, J. ; contr. per MANSFIELD, Ch. J. and CHAMBER, J.*

But clearly the one cannot distrain the cattle of the other damage feasant. *Per CUR.*

A. having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant, for having broken the stones. B. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones. A. replied that he was not bound to fence ; and on demurrer the replication was held bad.

Whether licence to take a profit à prendre be assignable—*Quære.*

In replevin, the defendant avowed that C. Bragge being seised in fee of the place in which, called Goulding's Hill Inclosure, demised and granted to C. Emmet and W. Emmet, and their assigns, the sole and exclusive liberty, license, and authority, from time to time and at all times thereafter, of working and quarrying of all quarries of paving stone, and tiles, that might be found in and upon the same, and all the paving stones, and

CHURCHILL
v.
EVANS.

tile, in or under the said place in which, for the term of 27 years ; by virtue of which demise and grant, the said C. and W. Emmet entered into the said place, and became possessed of the said sole and exclusive liberty, &c. together with all the paving stone and tile under the same close, according to the effect of the said demise and grant ; and being so possessed, afterwards assigned the same to the defendant for the residue of the term, by *virtue whereof the defendant entered the said place, and was possessed of the same liberty ; and because the said cattle, at the time when, were wrongfully and injuriously in and upon that part of the said place in which, which just before and at the said time when, was used by the defendant for the purpose of working and quarrying the quarries of paving stone and tile, there before that time found, and then found, breaking and injuring the paving stones and tiles then there being, and breaking and entering the sheds of the defendant, then there necessarily erected and being, for the purpose of quarrying and working the said quarries of paving stone and tile there, and for the complete enjoyment and exercise of the said grant and demise, and doing damage there to the defendant, he avowed taking them as a distress for such damage. The plaintiff, denying by protestation the sufficiency of the avowry, and the demise by Bragge, pleaded, that the place in which was a close containing six acres, and that he, the plaintiff, was lawfully possessed thereof, and that there was not, at the said time when, nor for long before was there, any sufficient fence or mound to prevent or hinder cattle, depasturing in the said close, from entering into and upon the said part of the said close, which was used by the defendant for working and quarrying the said quarries of paving stone and tile found in and upon the said place in which, or breaking and entering the said sheds, or to separate the same from the residue of the said close ; and that the plaintiff being so possessed of the close, a little while before the said time when, put in his cattle to depasture the grass there ; and if the said cattle, at the said time when, were in and upon that part of the said close which just before the said time when, was used by the defendant for the purpose of quarrying, &c. breaking and injuring the paving stones and tiles there, and breaking and entering the sheds there erected, the same was

[*330]

CHURCHILL
v.
EVANS.
[*531]

*occasioned by the neglect and default of the defendant, in not properly guarding, watching, fencing, and protecting the said stones, tiles, and sheds, from the said cattle, so lawfully turned into the said close, for the purpose and on the occasion aforesaid ; and the cattle were in the said close, as it was lawful for them to be, on the purpose aforesaid, until the defendant of his own wrong seized and took them, &c. The defendant protesting against the sufficiency of the plea, replied, that neither before nor at the said time when, was it the duty of him, the defendant, neither was he in any way obliged, to raise up any fence or mound, to prevent or hinder any cattle depasturing in the said close from entering into and upon the said part of the said close, which was used by him for quarrying, &c. or from breaking and entering the said sheds, or to separate the same from the residue of the close. The plaintiff demurred, and assigned for causes, that the defendant by his replication did not in any manner shew that he was not in default by not watching or otherwise keeping off the said cattle from the said stones or quarries ; and that the replication did not deny the right of the plaintiff to turn his cattle into the said close in which, nor his possession of the close, nor shew any obligation on the plaintiff to fence out, or watch the said cattle, from the said parts of the said close where the same were taken ; and that the replication was, in this and other respects, no answer to the plea, nor could any issue be taken on it ; and that the replication shewed no ground for supporting the distress, and seemed to draw into issue before a jury matter of law only, and no proper issue could be taken on it. The questions intended to be raised on these pleadings were, 1. Whether the interest conveyed by the grant to the Emmets was of such a nature that it could pass by assignment to the defendant ; and 2. Whether, in consequence of the grant of licence to work the stone quarries, *the owner of the land was answerable for damages done by his cattle, put into other parts of the close, and straying for want of fences into that part occupied by the grantee's works. 3. Supposing the owner of the land to be answerable for such damage, whether the grantee was justified in distraining, or whether, inasmuch as there was no demise to him, or exclusive possession of the soil in him, he should not rather have brought

[*532]

an action. 4. Whether the replication was sufficient, in denying merely the obligation on the grantee to fence, and not his obligation to watch and protect the quarries and works.

CHURCHILL
*
EVANS.

The Court relieved *Best*, Serjt. who would have argued in support of the demurrer, and called upon *Lens*, Serjt. to support the replication, desiring him to consider whether, supposing this grant amounted to a demise, it would hinder the possessor of the close from depasturing it in common with the plaintiff.

Lens admitted, that if this grant conveyed nothing more than a licence to do some act in the close of another, he could not sustain the case. But the grantor, in giving the sole and exclusive privilege of taking the stone, had granted so much, that he could not himself enter on the grantee; and though he might turn his cattle into the other part of the field, which was not quarried, he must take care to confine them to that part. Neither one of two neighbours is bound to fence against the other, except by prescription. Therefore when the plaintiff alleges that his cattle entered on the defendant for the want of fences, it is sufficient for the defendant to say that he is not bound to maintain a fence: it is only required of him to shew that he has a right to distrain, which he does, by stating that he is under no obligation to fence; and that the cattle have trespassed *on the quarry which he is working.

[*533]

(HEATH, J. observed that the avowry stated a licence only, so that upon the pleadings no question could arise respecting the effect of a lease.)

In a demise of pasturage there is no absolute demise of the soil. In *Burt v. Moore*, 5 T. R. 329,† it was held that a person who had a demise of the milk of certain cows to be fed on certain land, with a covenant that no other cattle should be fed there, might maintain trespass against the possessor of other cattle which came into those fields; and if he could maintain trespass, no doubt he could also distrain them. That was argued to be merely a licence, and a personal covenant about milk, but it was

† 2 R. R. 611.

CHURCHILL
v.
EVANS.

held otherwise. So in *Wilson v. Mackreth*, 3 Burr. 1824, which was an action for cutting turf, it was held that trespass lies wherever there is an exclusive right. In the present instance there is an exclusive right. 2 Ro. Ab. 549, Trespas H. He that hath only the herbage of a forest, or close, may have trespass *quare clausum fregit*, as well as if he had the land. So if one seised in fee demise the pasture of a close for years, the grantee shall have trespass *quare clausum fregit*, for the close itself is thereby demised to be pastured, and not merely the pasture to be taken by the mouth of his cattle. Ibid. pl. 2. With respect to the obligation which lay on the defendant to fence, it is held in the case of *Webb v. Paternoster*, 2 Ro. Rep. 143 and 152, that one who had licence for a limited term to put his hay on the land of another, could not maintain trespass against the lessee of the soil, whose cattle had eaten his hay after the term was expired; but besides that objection derived from the determination of the licence, which in the present case is still in force, there is a substantial difference in the nature of the grant; for in this case the grant abridges the grantor's future power of turning his cattle over his own field. The necessity of maintaining a fence, or keeping a guard to watch the cattle, is not incumbent

[*534] *on the plaintiff. It is similar to the case of two persons having adjoining fields, and no hedge between them, where neither is bound to repair the fence, but each must take care that his own beasts do not trespass on his neighbour. 2 Ro. Ab. 565, pl. 7. If my land be open to the highway, and the beasts of a stranger enter upon the land, it is not justifiable. Otherwise, if cattle in passage on the highway eat herbs or corn, *raptim et sparsim*, against the will of the owner: it will excuse the trespass. Co. Dig. Trespass D. Co. Dig. Droit. M. 2. If the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to inclose at his peril. And Dyer, 372 b. is cited, where the case is, that "a man seised of 200 acres of common moor, enfeoffed another of 50 acres of this moor, towards the north. The feoffee puts his beasts into the 50 acres, and *pro defectu clausuræ*, the beasts stray into the residue of the moor, and are there distrained, damage feasant; and it seems a good distress; for the purchaser is holden by law to enclose or guard his beasts within the 50 acres,

and so it seems ought the lord of the residue to do as to his beasts ; and so was it adjudged in this Term." In like manner, undoubtedly, the landlord or his tenant in the present case is entitled to use his pasture of the residue of his close, but he is also bound to prevent his cattle from entering on the other part ; and to draw the plaintiff's attention to this point, the defendant shews an exclusive demise of the quarry, in consequence of which the plaintiff cannot lawfully permit his cattle to wander over the said place in which, without taking care that they do no damage. This is not the case of a joint or common occupation, in which, undoubtedly, trespass would not lie, but it is an exclusive possession. In *Wilson v. Mackreth*, it was said that the circumstance of other persons having common of pasture over the turbary ground was immaterial. The replication, therefore, has sufficiently denied the material part of the plea, which infers an obligation on the defendant *to maintain a defence. As to the validity of the assignment, he admitted, that if the grant did not amount to a lease, but conveyed merely a licence, it was not an assignable interest.

CHURCHILL
v.
EVANS.

[*535]

Best in reply was stopped by the Court.

MANSFIELD, Ch. J. :

The cases cited do not come up to the present question. Upon the feoffment of 50 acres, each party had an equal exclusive right in his own land. Here the defendant has the exclusive right of digging stone, but the plaintiff has every other right in the soil, and he does not by any act of his injure the defendant's right : but the defendant having a partial and limited right here to take the stones, and the plaintiff possessing all other rights, in the fair exercise of the right of pasturage, which is one of them, this damage accidentally happens.

CHAMBRE, J. :

In the case of *Wilson v. Mackreth*, the plaintiff had not a mere right of turbary, but the exclusive possession of a portion of the turbary land, marked out by metes and bounds. But this quarry may progressively extend over every part of the close. There would be no end of fencing in this case ; for as soon as the

CHURCHILL v. EVANS. plaintiff had fenced, the defendant would dig stone under the fence and destroy it. He cannot possibly have any thing more than a concurrent possession of the land. And he cannot distrain a tenant in common.

LAWRENCE, J. :

The argument supposes that no advantage could arise to any person upon that spot, except from the stone; but the plaintiff has not by his pleadings disaffirmed that other advantages might arise on that spot, besides the getting those stones, as herbage for the *cattle. Perhaps the defendant might have brought an action for the mischief the cattle had done, or might have driven them off; but here he has distrained them.

Judgment for the plaintiff.

1809.
May 12.

CASWELL v. COARE.

(1 Taunt. 566—568.)

[566]

Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him.

If the horse is not returned, the measure of damages is the difference between his real value and the price given.

If the horse is not tendered to the defendant, the plaintiff can recover no damages for the expense of his keep.

THIS was an action upon the warranty of a horse, sold by the defendant to the plaintiff for the sum of 20*l*. Upon the trial of this cause at the sittings after last Hilary Term, at Guildhall, before Mansfield, Ch. J.† the warranty and unsoundness were proved; no tender had been made of returning the horse to any person who could be identified with the defendant as his agent. Whereupon *Cockell*, Serjt. contended, that the plaintiff could recover nothing for the keep of the horse; and *that if the plaintiff took the 20*l*. the horse must be returned. *Best*, Serjt. on the other hand, contended, that the defendant was not entitled to a return of the horse, unless he paid for his keep in the interim. MANSFIELD, Ch. J. directed the jury, that if the horse was returned to the defendant, the price of the horse ought to be given: if the horse was kept, the verdict ought to be for the difference between the value and the price. The jury, contrary to

[*567]

CASWELL
v.
COARE.

this direction, found their verdict for the plaintiff with 30*l.* 10*s.* damages, being 20*l.* for the horse, and 10 guineas for its keep. *Cockell* in this Term obtained a rule *nisi* to set aside the verdict and have a new trial; upon this application, it appeared that the horse had stood, both before the commencement of the action, and since the trial, at a livery stable, the keeper of which would not deliver up the horse, unless paid for his keep; but that immediately after the trial the plaintiff had given the defendant's attorney notice that the horse was there, and that he might go and take it there, but not accompanying the notice with any offer to pay for its keep.

Best, now shewed cause :

The plaintiff does not proceed upon a dissolution of the contract, but he contends that the expense of the keep of the horse is one of the consequences of the breach of the contract. He also relied on the notice given immediately after the trial. He again offered that the defendant might take the horse.

Cockell, contra :

That will not do : the horse must be delivered to the defendant.

MANSFIELD, Ch. J. :

The contract being broken, the defendant must give back the money, and the plaintiff must return the horse; but unless the plaintiff has previously tendered him, he cannot recover for the keep; *because it was not the defendant's fault that the plaintiff kept him. When the warranty was broken, the plaintiff might instantly have sold the horse for what he could get, and might have recovered the residue of the price in damages. All that can now be done, is to reduce the damages to 20*l.* and to let the horse be re-delivered.

[*568]

LAWRENCE, J. :

If the plaintiff buys the horse, it is his own, and he must keep his own horse as long as he has it.

*Rule absolute to reduce the verdict to 20*l.*, the plaintiff undertaking to deliver back the horse free of any expenses for its keep.*

1809.
May 13.

BOWCHER *v.* NOIDSTROM.†

(1 Taunt. 568—570.)

[568]

If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time.

The master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direction of a pilot, who, by the regulations of a statute, supersedes the master for the time in the government of his ship.

[*569]

THIS was an action of trespass, brought by the plaintiff, who was owner of a vessel called the *Providence*, against the defendant, who was master of a Swedish ship lying in the river, to recover a compensation for the damage which the plaintiff had sustained by the cutting away of part of his mainsail by a person on board the defendant's ship. The defendant pleaded the general issue. Upon the trial of this cause at Guildhall, at the sittings after last Hilary Term, before Mansfield, Ch. J. it appeared that while the plaintiff was endeavouring to steer his vessel between the defendant's ship, which lay at anchor, and another, he fell athwart the hawse of the defendant's ship, the gib boom of which went through the plaintiff's mainsail. After his vessel had been entangled *in this way for half an hour, a pilot who was on board, and had the care of the defendant's ship, gave directions to one of the crew to cut away; and the man to whom he gave the direction, immediately cut five or six clews of the plaintiff's mainsail, and part of his boom. The defendant's ship was in no danger, and it was probable that the plaintiff could, without this operation, have extricated his vessel in the space of another hour. The defendant was at that time on board, but he was asleep in his bed, and gave no orders throughout the whole transaction. With respect to the captain's liability, MANSFIELD, Ch. J. was of opinion, that although there was a pilot on board, the pilot does not represent the ship, and that the master was still answerable for every trespass. The jury found a verdict for the plaintiff.

Vaughan, Serjt. had, on a former day in this Term, obtained a rule *nisi* to set aside the verdict, and have a new trial, upon two objections. 1. That the action ought to have been brought

† See 1 Maude & Pollock, 4th ed., 286, n. (f).

against the pilot, not against the captain; because the stat. 3 Geo. I. c. 13, which compels the captain to take on board a pilot in order to come up the Thames, and supersedes his authority while the pilot remains on board, thereby also takes off the captain's responsibility for acts done during that time. 2. That the action ought to have been case, and not trespass. *Huggett v. Montgomery*, 2 Bos. & P. (N. R.) 446. BOWCHER
v.
NORDSTROM.

(LAWRENCE, J. mentioned, with relation to the first point, the case of an action brought against the captain of the *Russell* man of war, for running down the *London East Indiaman*. The captain was sleeping in his cabin: the lieutenant of the watch had the command of the ship; and it was urged that the captain was not liable for this misfortune, inasmuch as the lieutenant was not his servant, being put in by the Admiralty: but the objection did not prevail, and he was held liable.)

Shepherd, Serjt. now shewed cause:

[570]

An action upon the case could not have been maintained here, for this was not an act of negligence, but a wilful cutting: trespass, therefore, is the right action; and if the defendant relied upon any supposed necessity for cutting away the sail, he ought to have pleaded it in justification. In the case of a sheriff, trespass lies against him for the act of his bailiff.

Vaughan, *contra*.

The Court held that as it did not appear that the captain had done any act in this case, the rule to enter a nonsuit must be made

Absolute.

1809.

May 15.

[572]

TOPHAM *v.* BRADDICK.

(1 Taunt. 572—577.)

If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to re-deliver the residue unsold, on demand.

And an action does not lie against him for not accounting, till after a demand made of an account.

Therefore the statute of limitations runs only from the time of a demand made.

After a reasonable time elapsed, a jury might presume that the consignor had made a demand, and that the factor had accounted.

And 14 years would be a sufficient time for such a presumption.

If it were not rebutted by circumstances.

THE declaration in this case stated, that in the lifetime of William Cox, since deceased, who in his lifetime was a partner with the defendant, to wit, in August, 1795, in consideration that the plaintiffs, at the request of Cox and the defendant, had consigned and delivered to them certain goods to be by them sold and disposed of, for and on the plaintiff's account, for certain commission; Cox and the defendant undertook to render to the plaintiffs a just account of the sale of such of the goods as should be sold and disposed of, and to pay over the proceeds thereof, and also to return to them such of the goods as should remain unsold and undisposed of, when they, Cox and the defendant, should be thereto afterwards requested: the declaration then averred a request made to the defendant since the death of Cox, to wit, in April, 1808, and a refusal. The defendant pleaded, 1. The general issue. 2. That the action did not accrue within six years. Upon the trial of the cause at Guildhall, at the sittings after last Hilary Term, before

[*573]

*Mansfield, Ch. J., the plaintiff proved the consignment to have been made at the time stated in the declaration, with an invoice, in which Cox and the defendant were made debtors for 91*l.*, the amount of the goods, but there was no proof of any special contract as to the terms of the commission. It was also proved that Wood, another creditor, who had made similar consignments in 1795, had in 1801 applied to Braddick for payment of his debt, and had then received for answer that he could get no account from Cox, but that when he did he would dissolve the

partnership and pay the creditors. The partnership was dissolved in 1802, and Cox died in 1804. In April, 1808, the plaintiffs applied by letter to the defendant for an account of the sales, and payment of the proceeds, and for re-delivery of such part of the goods, if any, as might be yet undisposed of. To this letter the defendant returned no answer, and there was no proof that he had in any manner admitted his liability within the last six years. *Vaughan*, Serjt., for the defendant, contended, that it ought to be presumed from the lapse of 15 years since the delivery of the goods, that the plaintiff had made a demand at some time before, and that the defendant had accounted. The jury, under the direction of MANSFIELD, Ch. J., who thought that the cause of action was not complete till a demand made, found a verdict for the plaintiff.

TOPHAM
v.
BRADDICK.

Vaughan, in this Term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the same objections which he had made at the trial.

Shepherd and *Best*, Serjts., now shewed cause :

The words of the statute of limitations are, “within six years next after the cause of action.” That must mean a clear and complete cause of action. This cause of action was not complete till long within six years before the *commencement of the suit. It might be extremely difficult to say at what time the plaintiff was entitled peremptorily to demand an account: the law would say it must be within a reasonable time; but when that period arrives, the plaintiff must mark it by an act of his own, by a request to account. If a debt is immediate upon some particular event, as the delivery of goods sold, or the arrival of a pay-day fixed by the contract, no demand is necessary, and in that case the statute would operate from the time fixed: but this is not a contract that the defendant will, within a given time, account: when can it be said that this plaintiff had a complete right of action? Certainly not upon the instant delivery of the goods. And if not then, what other period is to be assigned from which the six years can be computed? It was necessary that the plaintiff should ask for an account, before he could sue for the neglect to deliver it, he could not maintain this action

[*574

TOPHAM
v.
BRADDICK.

without averring in his declaration the demand of an account, and that which is material to be averred, is also material to be proved; and if he had sued without such previous request, the want of it would have been a good defence. The cause of action, therefore, is complete only from the time of the demand. In 1 Bl. Rep. 353, *Fenton v. Emblers*, Lord MANSFIELD, Ch. J. held that the statute of limitations runs only from the time of a contingency happening, not from the time of the promise: consequently, unless it can be shewn that the plaintiff had applied for the account more than six years before the commencement of this suit, the statute of limitations does not protect the defendant. The request made in 1801 was not made on account of these goods.

Vaughan, Serjt. contra :

[*575]

There was no precise evidence of the contract stated in the declaration: the only evidence was, that other persons had dealt with Cox and *Braddick on these terms. But supposing the contract proved, more than six years have elapsed since the cause of action was complete: for the defendant promised generally that he would pay all the partnership debts upon the dissolution of the partnership. That event took place in 1802, and the cause of action became complete upon that contingency happening, since which more than six years have elapsed. According to the plaintiff's argument, thirty or fifty years would not do away the cause of action. But the law requires that at all events the goods must be either sold or returned within a reasonable time, and as so many years have elapsed, it ought to have been left to the jury to presume whether a demand had not been made before. In 1 Salk. 421, *Green v. Revett*, Lord Holt said that the statute of limitations, upon which the security of all men depends, was to be favoured. Presumptions ought, therefore, to be raised in favour of it; and as it is a remedial statute, it ought to be liberally construed. If a promissory note is made payable on demand, a previous demand is not necessary: the commencement of the action is a sufficient demand. 12 Mod. 444. *Collins v. Benning*, the Court held that if the promise were for a collateral thing, which would create no debt

till demand, it might be necessary for the defendant to plead that he had not promised within six years after demand made; but there it was an *indebitatus assumpsit*, which shewed a debt at the time of the promise, and, therefore, a plea of *non assumpsit infra sex annos* was good. The case cited from Blackstone is not applicable.

TOPHAM
v.
BRADDICK.

MANSFIELD, Ch. J. :

It would be too much to say that we could find a period, which must be between 1801 and the present time, when the plaintiff could have brought an action: the defendant's own case proves that *the plaintiff was to do a collateral thing, and that no action lay till demand. How and when was the demand to be made? The only person who could know the state of the consignment, had neglected, according to the defendant's own statement, to render any account, up to the year 1801. In that year, Wood, who stood in the same predicament, though not in the same contract, with the plaintiff, made a demand, not with any view to found this action; and the defendant then said he could get no account from Cox. If Cox had then rendered no account of the goods of Wood and others, there was little ground for the jury to presume that he had rendered any account of the plaintiff's goods. Wood waited three or four years before he sued,† with the hope that the defendant might receive an account from Cox. Why then are we to fix on any particular period after 1801, and before this action brought, at which we may presume that the defendant did account? Or why are we to presume that an earlier demand was made by the plaintiff, when it appears that none was made by the other creditors? And the case in 12 Mod. shews there must be a demand made. There is no ground, therefore, to direct a jury to presume that any account had been rendered, nor would they have presumed it if they had been so directed; for strong evidence was given against it, by the defendant's assigning the reason why he had not accounted.

[*576]

HEATH, J. was of the same opinion. In ordinary cases it might be presumed, from length of time, that the consignee had accounted. But a demand must be either proved or presumed,

† Wood v. Braddick, 9 R. R. 711 (1 Taunt. 104).

TOPHAM
v.
BRADDICK.
[*577]

in order to give the plaintiff a cause of action ; and what reason had either my Lord or the *jury to presume a demand in this case? The only probable presumption was, that the parties had accounted, and the circumstances disproved that.

LAWRENCE, J. :

The action would not lie at the end of a week from the delivery of the goods : this is not like the case of money lent, which is recoverable the next week. The goods were not delivered to be accounted for on the next day ; they were to go to a distant country to be disposed of, and considerable time must be allowed for their arrival there, for their sale, and for the return of the account. I remember an action of trover between Lord Bute and Mr. Wortley Montague, for furniture left for many years in a mansion-house. The statute of limitations was set up ; but the demand and refusal proved were of recent date, and the plaintiff recovered. There, no demand and refusal were presumed to have been made at any time before, for the possession was in its commencement a legal possession.

CHAMBERE, J. concurred. It is perfectly clear from the case cited by *Vaughan*, that the statute could not run from the beginning of the contract. The space of fourteen years might have given ground for an inference that all had been fully accounted for and paid : for by an account, I think, is meant, not a piece of paper, but payment. But there is evidence that the defendant had complained that Cox had not remitted the proceeds, or rendered any account, which repelled the presumption. The plaintiff, therefore, is entitled to his verdict, and the rule must be

Discharged.

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

WEDDERBURN AND OTHERS v. BELL.

(1 Camp. 1—3.)

1807.
Dec. 1.

A ship, insured on condition of sailing with convoy, must (to be seaworthy) be properly equipped with sails so as to be able to keep up with convoy, as well as furnished with a sufficient crew.

[1]

ASSUMPSIT on a policy of insurance, on goods on board the *Minorca*, at and from Jamaica to London, at a premium of ten guineas per cent. to return 5*l.* per cent. if the ship sailed from the place of rendezvous with convoy for the voyage and arrived. The first count of the declaration laid the loss to be by the barratry of the master; the second, by the perils of the sea.

The ship sailed for England with convoy in the end of July, 1806. On the 12th of August she parted from the fleet, and being never more heard of, was supposed to have foundered in a hurricane, which immediately followed.

The defence rested on two grounds; first, that the ship on the homeward-bound voyage was not properly equipt with sails; and 2ndly, that she had not a sufficient crew. It appeared in evidence, that her sails to be used in stormy weather were in good condition; but that her main-top-gallant sail and studding-sails, which are useful in light breezes, were extremely rotten, and almost quite unserviceable. The evidence concerning the crew was contradictory.

[2]

The *Attorney-General* for the plaintiffs contended, that the decayed state of the top-gallant-sail and studding-sails could not constitute any want of sea-worthiness; as they were not at all essential to the safety of the ship, and could only be used in calm weather to quicken her speed. All that the doctrine of sea-worthiness required was, that at the time of the insurance the ship should be fit to perform the voyage, unless some external

WEDDER-
BURN
and Others
v.
BELL.

accident intervened. The *Minorca* was clearly in a condition to do this, notwithstanding the supposed deficiency in these sails; and in fact the loss had not been at all occasioned by the want of them, but by the hurricane, in which they would have been useless. The weight of testimony he maintained was in favour of the sufficiency of the crew, and besides, it was often impossible to procure hands in the West Indies upon any terms.

LORD ELLENBOROUGH:

[*3]

In an action of this kind, the plaintiffs are bound to prove, not only that the ship was tight, staunch, and strong, but that she was properly equipt with sails, and other stores, and that she was manned with a sufficient crew to navigate her on the *voyage insured. These are conditions precedent to the policy attaching; and if they were not complied with, so that the peril was enhanced; from whatever cause this might arise, and though no fraud was intended on the part of the assured, the underwriters may answer, "we are not liable." The hull of the ship in this case was sufficient and sea-worthy; but it appears, that when she left Jamaica, her sails were highly defective. It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, and which might enable her, if not intercepted, from at some period or other completing her voyage. A person who underwrites a policy upon her has a right to expect that she shall be so equipt with sails, that she may be able to keep up with the convoy, and get to her port of destination with reasonable expedition. She must be rendered as secure as possible from capture by the enemy, as well as from the dangers of the winds and waves. But here the *Minorca* appears to have been deficient in sails, on which her speed might materially depend; and if so, the risk being thereby greatly increased, the policy never attached, and this action cannot be supported. His Lordship was also of opinion, upon weighing the testimony on the one side and on the other, that the crew was insufficient.

The defendant had a verdict.

TINSON v. FRANCIS.†

(1 Camp. 19—20.)

1807.
Dec. 4.

[19]

Although the *bonâ fide* holder of a promissory note, made without consideration, himself gave a full consideration for it; yet if he took it after it was due from an indorser, who had been entrusted with it for a special purpose and without any right to negotiate it, he cannot maintain an action upon it against the maker.

ASSUMPSIT on a promissory note, at the suit of the indorsee against the maker.—A *primâ facie* case being made out by the plaintiff, it was proved on the part of the defendant, that the note was given by him to accommodate a person of the name of Ticken, the payee; that it remained in the hands of the latter, till after it became due; that he then gave it to a Mr. Stevens, an attorney, to be returned to the defendant, and that Stevens indorsed it to the plaintiff.

The *Attorney-General* for the plaintiff said his client was not at all aware of the circumstances under which the bill had been originally made, or had come into the hands of Stevens, and there were several witnesses to prove that he had given Stevens a full consideration for it.

LORD ELLENBOROUGH :

After a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes

† This case has been criticised by MALINS, V. C. in *Ex parte Swan* (1868) L. R. 6 Eq. 344, 18 L. T. N. S. 230, and it is noted by His Honour, Judge Chalmers among the doubtful cases. If however Lord ELLENBOROUGH's judgment is read in the light of the facts stated, it is not inconsistent with His Honour's proposition that "after long controversy it now seems settled that mere absence of consideration is not an equity which attaches to a bill" (*Sturvenant v. Ford* (1842) 4 M. & Gr. 101; *Ex parte Swan*, *ut supra*).

The case seems to be an apt illustration of the words of the Act of 1852, that an overdue bill can only be negotiated "subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had." So that the plaintiff in such a case would have no better title than Stevens, the fraudulent attorney. The original head-note however seems to require modification, as tending to support a doctrine which is exploded.—R. C.

TINSON
v.
FRANCIS.

it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered.

Verdict for the defendant.

1807.
Dec. 5.

THE MAYOR, &c. OF LONDON v. LONG, Esq.

(1 Camp. 22—27.)

[22]

The words of a grant from the Crown, by contemporaneous exposition and constant usage, may be extended beyond their natural import, so as to confer a right to exercise an office within a city and the liberties thereof, granted only to be exercised within the city. It is part of the ancient prerogative of the Crown, as incident to the duty of customs, to appoint officers to gauge all gaugeable articles imported into the kingdom, whether for sale or otherwise.

THIS was an action by the Corporation of London, against the defendant, representing the London Dock Company, for disturbing them in exercising the office of gauger within the London Docks. The first count stated the plaintiffs to be entitled to the office and occupation of gauger, within the city of London, and the port of the said city, of all wines, oils, and other merchandizes and things gaugeable therein, at any time coming thereto. The 2nd count was the same, only saying they were entitled to the gauging of articles within these limits. The 3rd and 4th, differing like the two former, claimed the right within the city and the liberties thereof. The two last counts confined the claim to the city itself.—Plea, the general issue of not guilty.

[23]

After some formal proof, there was put in an office copy of an inrolment in the Exchequer of a charter of 14 Charles I. This contains an *inspeximus* of a charter of 18 Edward IV., whereby the King “grants and confirms to the Mayor and Commonalty and Citizens of the city of London, and their successors, the office, occupation, and exercise, of gauging all wines, oils, and other merchandizes and things gaugeable within the city aforesaid,† at whatsoever time brought or coming to that city.”

† *Infra civitatem prædictam.*

It was admitted by the counsel for the plaintiffs, that the London Docks are not within the city of London; but they proposed to shew, that the corporation had constantly exercised the office of gauger on all wharfs in the river Thames, as well without as within the city; and that the grant therefore was not to be limited to the city strictly so called, but extended to the liberties of the city.

THE MAYOR.
&c. OF
LONDON
v.
LONG.

Best, Serjt. for the defendant, objected to the admissibility of this evidence, as explanatory of the meaning of the charter. He allowed that usage might limit the general words of an old grant; but it could not be given in evidence to extend the grant. The words here were clear, and confined the privilege within the walls of the city.

LORD ELLENBOROUGH :

We may receive evidence not only of what is comprehended within the *civitatem* **prædictam* now, but what were considered as the bounds of the *civitas* in former times. If the corporation of London have exercised this office beyond the walls of the city, the practice has been in derogation of the Crown, who otherwise would have had a right to appoint a gauger there, as over the rest of the realm; and thus the privilege must have been enjoyed adversely against the grantor of the charter to be explained. What is comprehended by the word *civitas* is a question of fact.†

[*24]

* * * * *

Best, Serjt., still contended that the plaintiffs could not be entitled to a verdict in this action, as they had at most established their right to gauge articles sold; whereas in the declaration they claimed the office to gauge all wines, &c. within the city of London, or the port and liberties thereof, or coming thereto. Such an office could not be legally created. The Crown for the purpose of regulating sales at common law, might appoint an

[25]

† 2 Inst. 11, 282. *Attorney-General v. Parker*, 3 Atk. 576; (3 T. R. 279); *Rez v. Bellringer*, 4 T. R. 810. *Withnell v. Gartham*, 3 B. R. 218 (6 T. R. 388).
Blankley v. Winstanley, 1 B. R. 704

THE MAYOR, &c. OF LONDON.
 T.
 LONG.

officer to gauge articles to be sold, but could not empower any one to enter the warehouse of a subject, against his consent, and compel him to pay for gauging articles, which he himself meant to consume. Nor was such authority given by 31 Ed. III. c. 5,—4 Ric. II. c. 1, or any of the subsequent statutes on this subject.—He afterwards argued, that the privilege, whatever it might be, must be confined to the limits of the city; from other offices being expressly granted in the charter, to be exercised within the port of London, or from Staines Bridge to Yendal in Kent; and from the impossibility of words so *clear as those concerning the office of gauger receiving any extension.

[*26]

Lord ELLENBOROUGH said, that the exclusion being admitted, the only question was as to the right of the corporation to exercise within the London docks the office of gauger, which, with several others, had been granted to them by Edward IV. for the sum of 7,000*l*. The office of gauger by the words of the grant, was to be exercised within the city; which words in their natural sense, must mean within the walls of the city; but looking to other parts of the same charter in the *inspeximus* of 14 Charles I. it appeared, that different offices were granted to the corporation, some of them to be exercised within the city, and others, without any apparent reason for the distinction, within the city and liberties thereof; and it was possible that *civitatem*, as applied to the office of gauger, might be used in a laxative sense, so as to comprehend, amongst other places without the walls, the site of the London docks. Then, was there evidence to support this construction? The oath of office must be presumed to have continued the same since the time of Edward IV. and must therefore be taken as a contemporaneous exposition of the grant by the Crown itself. The usage likewise as far back as could be traced, shewed, that the word city had received, as it was susceptible of, a larger interpretation than within the limits of the walls. If it comprehended the liberties, the bounds of these not being proved, they must be taken to extend to such places where the right had been exercised. As to the creation of the office, he conceived, there *was nothing

[*27]

to restrict the Crown to the appointment of a gauger to gauge articles for sale. The duties of customs were inherent in the Crown from the earliest periods; and if the Crown had this right, it must have had the means of enjoying it; which could only be, by ascertaining the quantities of articles imported, whether for sale or otherwise. The corporation of London, therefore, might represent the Crown in the exercise of its functions with regard to this office, as it did in various others, concerning which no doubt had ever been entertained.

THE MAYOR,
&c. OF
LONDON
v.
LONG.

The plaintiffs had a verdict on the 3rd and 4th counts, with nominal damages.

[The Court afterwards directed that there should be a trial at bar, in order that points of such magnitude as the case involved might receive the most solemn consideration. *Addenda*, 1 Camp. 180 b.]

COLSELL AND OTHERS, EXECUTORS, &c. v. BUDD AND OTHERS, EXECUTORS, &c.

(1 Camp. 27—29.)

1807.
Dec. 7.

[27]

To raise the presumption that a bond has been satisfied, there must be a lapse of the full period of 20 years from its becoming forfeited; unless there be some additional circumstance, as an intermediate settlement of accounts between the parties.†

DEBT on bond. Pleas *non est factum testatoris*, and payment at and after the day by the executors.

The bond was dated 23rd January, 1779, and was conditioned for the payment of 1,000*l.* to the plaintiffs' testator within three months, after the death of one Mary Colsell, who died in December, 1787. The defendants' testator was then dead. The plaintiffs' testator lived three years after. No demand of payment had been made till the commencement of the present action.

[28]

† By 3 & 4 W. 4, c. 42, s. 3, the period of 20 years is expressly prescribed. The above case still seems

the primary authority for the proposition, that no less period will suffice.—R. C.

COLSELL
and Others
v.
BUDD
and Others.

Dampier, for the defendants, contended, that although the money not being payable till March, 1788, twenty years had not since elapsed, still payment was to be presumed, as it was now so very near that period, and it must be supposed, that if the bond had not been discharged, the plaintiffs, as executors, would long since have put it in suit. He relied upon *Oswald v. Leigh*,† where Lord MANSFIELD is stated to have said, “That there was a distinction between length of time as a bar, and where it was only evidence of it; the former was positive, the latter only presumption; and he believed, that in the case of a bond, no positive time had been expressly laid down by the Court, that it might be 18 or 19 years.” *Dampier* further undertook to shew, that in May, 1788, a settlement of accounts had taken place between the defendants and the plaintiffs’ testator, when the latter received from them a sum of money sufficient to cover the present demand, which must be taken to have been at that time satisfied.

[29]

A witness was then called, who spoke to the parties having met at the period above mentioned, and having paid a large sum of money to a third person; but it did not appear that there had been any settlement of accounts as between themselves.

LORD ELLENBOROUGH :

After a lapse of 20 years, a bond will be presumed to be satisfied; but there must either be a lapse of 20 years, or a less time, coupled with some circumstance to strengthen the presumption. Here, if it had been proved, that the parties had accounted together, after the money became payable, it might have been inferred that it was included in the settlement; but as there is no evidence of this, and as 20 years have not elapsed since the bond was forfeited, it cannot be considered as discharged.

Verdict for the plaintiffs.

† 1 T. B. 272.

WHATLEY AND OTHERS v. TRICKER AND OTHERS.

(1 Camp. 35—36.)

1807.

Dec. 8.

[35]

The holder of a bill of exchange may discharge the liability of the acceptor by parol; but for this purpose, the words must amount to an absolute renunciation of all claim upon him in respect of the bill.†

ASSUMPSIT against the defendants as acceptors of a bill of exchange for 20*l.* 11*s.* 9*d.* drawn by one Ross, payable to his own order, and indorsed by him to the plaintiffs. A *prima facie* case being made out in their favour,

The defence was, that they had waived their remedy against the defendants as acceptors of the bill. In support of this, it was proved that as the plaintiffs knew the defendants had received no consideration for the bill, and as they had in their hands a large quantity of goods, the property of the drawer, from the produce of which they expected to be satisfied for this as well as several other demands upon him, they had said at a meeting of the defendants' creditors, "they looked to the drawer and should not come upon the acceptors of the bill;" in consequence of which, the defendants assigned the whole of their property for the benefit of their other creditors, and paid them 15*s.* in the pound. However the goods of the drawer in the plaintiffs' hands had turned out to be of little value, and he had since become insolvent.

Lord ELLENBOROUGH directed the jury to consider whether the language employed by the plaintiffs amounted to an absolute unconditional renunciation by them as holders of the bill of all claims in respect of it upon the defendants as acceptors; whereby the latter had entered into an arrangement with their creditors. In that case the acceptors were discharged from their liability; the holders had made their election and could now only proceed against the drawer. On the other hand, if the words only imported, that they looked to the drawer in the first instance; that it was not then necessary to come upon the

[36]

† By the Bills of Exchange Act, that the bill is delivered up to the acceptor.—R. C.
1882, s. 62, the condition is added

WHATLEY
and Others
v.
TRICKER
and Others.

acceptors, and that they should not resort to them, if satisfaction could be obtained from another quarter, they did not waive their remedy by this conditional promise, and the acceptors still continued liable, until the bill should be actually paid.

The jury found for the plaintiffs.

1807.
Dec. 8.

FARNSWORTH v. GARRARD.

(1 Camp. 38—41.)

[38]

Where the plaintiff declares on a *quantum meruit* for work and labour done and materials found, the defendant may reduce the damages by shewing that the work was improperly done; and may entitle himself to a verdict by shewing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.

ASSUMPSIT for work and labour done and materials found; with the common counts. Plea, *non assumpsit*, with a notice of set-off.

The defendant had rebuilt the front of a house for the plaintiff; but when finished, it was considerably out of the perpendicular, and, according to several of the witnesses, in great danger of tumbling down, though others said it might stand for many years.

Park contended that the plaintiff was still entitled to recover the whole of his demand; and that if the building was so ill executed as was represented, the defendant's remedy was a cross action. He relied upon *Duffit v. James*,† *Cormach v. Gillis*,† *Morgan v. Richardson*,† and particularly *Templer v.*

† Cited 7 East, 480, 1, 2.

[40 n.]

N.B. I have seen an accurate note of *Morgan v. Richardson*; from which it appears that it is not an authority for the purpose for which it was cited here or in *Basten v. Butter* (7 East, 479). The action was against the acceptor of a bill of exchange at the suit of the drawer, the bill being payable to his own order.—Defence, that the bill had been accepted for the price of

some hams bought by the defendant from the plaintiff, to be sent to the East Indies; and that the hams had turned out so very bad that they were almost quite unmarketable. The sum for which they actually sold was paid into Court.—Lord ELLENBOROUGH held that though where the consideration of a bill of exchange fails entirely, this will be a sufficient defence to an action upon it, by the

M'Lachlan,† in which the court of Common Pleas had recently decided, that negligence cannot be set up as a defence to an action on an attorney's bill. At any rate the plaintiff must have a verdict with some damages; as it was impossible that the defendant should be allowed to keep the bricks without paying for them.

FARNS-
WORTH
v.
GARRARD.

LORD ELLENBOROUGH:

This action is founded on a claim for meritorious service. The plaintiff *is to recover what he deserves. It is therefore to be considered how much he deserves, or if he deserves any thing. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Mr. Justice BULLER thought, (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind, a cross action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it. I have since had a conference with the Judges on the subject; and I now consider this as the correct rule,—that if there has

[*39]

original party, it is no defence to such action, that the consideration fails partially; but that under such circumstances the giver of the bill must take his remedy by an action against the person to whom it was given.

LORD ELLENBOROUGH:

By delivery on board the ship the wine became the property of the defendant, and he must bear all risks and bring his action against the captain if the wine be spoiled in its passage. To sustain this defence, it must be shewn not only that the plaintiff is a partner in the house of Fleming, Goodall, & Co. who drew the bill, but that there was a fraud on their part in the first instance in shipping a commodity of a different and very inferior quality to that ordered. If it was a clear fraud in the shippers, and the plaintiff was a partner in their house, he could not recover on this bill; but this defence is not sufficient if the commodity shipped only be of rather an inferior quality to that ordered.

† 2 Bos. & P. (N. R.) 136.

FLEMING v. SIMPSON.

K. B. Sittings after M. T. 1806.

(1 Camp. 40.)

Action by the indorsee of a bill of exchange against the acceptor. This bill was drawn by Fleming, Goodall, & Co. and accepted by the defendant, for the amount of a pipe of "best London particular Madeira," which he had ordered of them. The defence set up was that the wine was a very bad quality when delivered in London, and could not have been best London particular Madeira when shipped, and that the indorsee was a partner in the house of the shippers.

FARNS-
WORTH
v.
GARRARD.

been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit. Here then has there been any benefit, and to what amount? If the wall will not stand and must be taken down, the defendant has derived no benefit from the plaintiff's service, but has suffered an injury. In that case he might have given him notice to remove the materials. Retaining them, he is not likely to be in a better situation than if the plaintiff had never placed them there; but if it will now cost him less to rebuild the wall, than it would have done without these materials, he has some benefit and must pay some damages.

[40]

Verdict for the defendant.

1807.
Dec. 8.

JANSON v. BROWN.

(1 Camp. 41—42.)

[41]

If defendant justifies shooting a dog, because the dog was worrying his fowl, and could not otherwise be prevented, he must prove that the dog was in the act of worrying the fowl at the very moment he shot him.

TRESPASS for shooting the plaintiff's dog. Pleas, 1, not guilty; and 2, a justification, that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented from so doing.† Replication to the last plea, *de injuriâ suâ propriâ absque tali causâ*.

† *Wright v. Ramscot*, 1 Saund. 84, is a strong authority that such an averment is necessary in a plea of this kind; although in *Keck v. Halstead*, 2 Lutw. 1494, a justification omitting it was held to be good. It seems, that if the transaction had taken place in the defendant's poultry-yard, it would have been enough to have stated in the plea, that the dog was pursuing the fowl; as it is not necessary to allege that

the defendant could not otherwise prevent the dog from killing conies in a warren; but it is sufficient to state, that the dog was in the warren pursuing the conies there, and therefore he killed him. *Wadhurst v. Damme*, Cro. Jac. 44. And it is the same, if a dog runs after deer in a park. *Barrington v. Summers*, 3 Lev. 28; 1 Sid. 336; Com. Dig. tit. Pleader (3 M. 33).

The case being made out on the part of the plaintiff, *Garrow* for the defendant said, he should prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. But,

JANSON
v.
BROWN.
[42]

Lord ELLENBOROUGH said, this would not make out the justification; to which it was necessary that when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means.

Verdict for plaintiff, with 1s. damages.

COURTEEN v. TOUSE.

(1 Camp. 43—44.)

1807.
Dec. 9.

When it is necessary to contradict a witness on the other side, as to the contents of a letter, which has been destroyed, the witness may, after exhausting his memory in answer to a general question as to the contents of the letter, be asked specifically whether it contained a certain statement.

[43]

ACTION on a policy of insurance on goods on board the *Mary*, from London to Leghorn.

The ship, the plaintiff himself being on board, put into Ferrol, through stress of weather, during the late peace; where, according to his case, she was seized and condemned with her whole cargo, for a supposed breach of the Spanish revenue laws. The defence was, that the plaintiff himself had written a letter from Ferrol to his son in London, saying, that he had disposed of all his goods, at a profit of 30 per cent.

The son being called to prove the execution of the policy,† was cross-examined as to the contents of *the letter. He swore

[*44]

† The policy was signed by one Butler for the defendant. A witness called before proved Butler's handwriting, and swore that he had often observed him sign policies for the defendant; but he had not seen any

general power of attorney from the defendant to Butler; nor did he know that the defendant had given Butler authority to sign this specific policy; nor was he acquainted with any instance in which the defendant had

COURTEEN
v.
TOUSE.

that it was lost, but that it contained no intimation of the kind supposed, and only said upon that subject, that the plaintiff might have disposed of his goods at a great profit, as he had been offered 8s. for a pair of cotton stockings he then wore, by a custom-house officer.

To contradict this testimony, several witnesses were produced, to whom the letter had been read, when received in London. One of these having stated all that he recollected of it, was asked, "if it contained any thing about the plaintiff having been offered 8s. for a pair of cotton stockings, by a custom-house officer." This being objected to as a leading question,

Lord ELLENBOROUGH ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked, if it contained a particular passage recited to him, which had been sworn to on the other side; otherwise, it would be impossible ever to come to a direct contradiction.

It afterwards appeared from the evidence of the captain, that the whole of the cargo had been seized as forfeited, and

The plaintiff had a verdict.

paid a loss upon a policy so subscribed. Lord ELLENBOROUGH held that the proof of agency must be carried farther. *Neal v. Erving*, 1 Esp. Cas. 61 (5 R. R. 720).

If it is established, that an agent had authority to sign a policy for an underwriter, it follows, that he had authority to adjust it. *Richardson v. Anderson*. Sittings after M. T. 1805. Action on a policy of insurance. Loss by capture. The subscription of the policy by defendant's

agent was admitted, and a witness proved the signature of the same agent to an adjustment on the policy as for a total loss.—Lord ELLENBOROUGH: If an agent has authority to subscribe a policy, he may also adjust it; and here as you have admitted the agent's subscription to the policy, and that he was authorised to subscribe it, you are bound to admit that he had authority to sign the adjustment.

WALLACE v. HARDACRE.†

(1 Camp. 45—48.)

1807.
Dec. 9.

[45]

If A. the indorsee for value of a bill of exchange, to which B. the indorser had forged the acceptance of C. delivers it up to B. on his solicitation, and receives from him, in lieu thereof, a bill accepted by D. without consideration; A. may maintain an action on this bill against D., unless there was an agreement between him and B. to stifle a prosecution for forgery.

ASSUMPSIT against the defendant as acceptor of a bill of exchange dated 23rd March, 1807, for 319*l.* 10*s.* drawn by Edward Maine, at two months, payable to his own order, and indorsed by him to the plaintiff.

Proof being given of the defendants handwriting to the bill; that Maine had indorsed it by procuration; and that at the time of the indorsement, Maine was largely indebted to the plaintiff,—

There were two defences set up to the action. First, that the plaintiff was not a *bonâ fide* holder of the bill. In support of this, the facts were, that Maine had forged the acceptance of a Mr. Addison, his uncle, to several bills, and paid them to Wallace, the plaintiff; but before they became due, he applied to the plaintiff, requesting him not to present them for payment, or he should be ruined, and offering him a bill accepted by the present defendant, in lieu of them. The forged bills were accordingly delivered up, and the bill the subject of this action, was sent to the plaintiff. It was then unindorsed; but Maine, by a letter dated 23rd April, 1807, authorized one Murphy to indorse it, who did so accordingly. The acceptor had received no value for it.

Park for the defendant therefore contended, that the consideration for the bill, as between Maine and the plaintiff, was corrupt and illegal. Even supposing that the plaintiff did not mean to compound felony, *still he had not given that *bonâ fide*

[*46]

† The law as laid down by Lord ELLENBOROUGH in this case is approved by LINDLEY, L. J. in *Jones v. Merionethshire Building Society*, '92, 1 Ch. 173, 181, 61 L. J. Ch. 138,

65 L. T. 685; and by Lord CRANWORTH, C. in *Williams v. Bayley* (H. L. 1866) L. R. 1 H. L. 200, 213, 35 L. J. Ch. 717, 14 L. T. N. S. 802. —R. C.

WALLACE
HARDACRE.

consideration which could enable him to maintain an action as indorsee of an accommodation bill. Being aware of the forgery, it was his duty not to have parted with the means of bringing the delinquent to justice ; and he could not be considered as an innocent holder of a bill which he had thus obtained.

Lord ELLENBOROUGH however held, that to bar the right of the indorsee, it was necessary to shew that the bill had been indorsed as a consideration for compounding a prosecution for forgery, to which the indorser was liable. It was common enough, upon discovering that bank-notes or bills of exchange had been forged, to send them back to the persons from whom they had been received, and to get others that were valid in their stead. But it would be too much to say, that the consideration for these last was corrupt and illegal, and that they could not be rendered available in the hands of those whose object in getting possession of them was merely to exchange securities that were forged for others without this vice. If any bargaining could be shewn here to stifle a prosecution for a criminal act, the action certainly could not be maintained ; but otherwise, the mere substitution would not invalidate the plaintiff's right to recover against the acceptor of this bill.

* * * * *

CHAMPION v. SHORT.†

(1 Camp. 53—55.)

1807.
Dec. 9.

[53]

If a person orders several articles from a tradesman, at the same time, though at distinct prices, he may consider the whole as forming one order, and he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accept of any one article, he is precluded from saying that the order was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract.

ASSUMPSIT for goods sold and delivered. Plea, tender as to 11l. 9s. and *non assumpsit* as to the residue.

The defendant resides at Salisbury, and on the 7th May, 1806, gave an order to the rider of the plaintiff, a wholesale grocer in London, “for half a chest of French plums, two hogsheads of raw sugar, and 100 lumps of white sugar; to be all sent down without delay.” The plums and the raw sugar arrived nearly as soon as the course of conveyance would permit; but the white sugar not coming to hand, the defendant countermanded it, and gave notice to the plaintiff, that as he had wished to have the two sorts of sugar together, or not at all, he would not accept of the raw. The plums he used, and the sum tendered was sufficient to *cover their value. The plaintiff not going for the price of the lumps, the only question was, as to the defendant’s liability, under the circumstances, to pay for the two hogsheads of raw sugar.

[*54]

On the one hand it was urged, that the order given was one entire contract, on the entire performance of which the defendant relied, and that it was not competent for the plaintiff to execute only such parts of it as were convenient or advantageous to himself;—while it was contended on the other, that where there were a great many different articles ordered at separate and distinct prices, they could not be considered as constituting one order or one contract, and that, at any rate, the defendant was here prevented from availing himself of this defence, by using and tendering to pay for the plums.

† As to a contract of this kind being entire for the purpose of s. 17 of the Statute of Frauds, *Baldey v. Parker* (1823) 2 B. & C. 37.—F.P.

CHAMPION LORD ELLENBOROUGH :

v.
SHORT.

Where several articles are ordered at the same time, it does not follow, although there be a separate price fixed for each, that they do not form one gross contract. I may wish to have articles A. B. C. and D. all of different sorts and of different values ; but without having every one of them as I direct, the rest may be useless to me. I therefore bargain for them jointly. Here, had the defendant given notice that he would accept neither the plums nor the raw sugar, as without the white sugar they did not form a proper assortment of goods for his shop, he might not have been liable in the present action ; but he has completely rebutted the presumption of a joint contract including all the articles ordered, by accepting the plums, and tendering payment for them. Therefore, if the raw sugar was of the quality *agreed on, and was delivered in reasonable time, he is liable to the plaintiff for the price of it.†

[*35]

Verdict for the plaintiff, damages 108l. 14s. 6d.

† Vide *Barker v. Sutton*, Lent Assize, Norf. 1662, Trials p. Pais, 369 ; Gilb. Law Ev. 191, where the plaintiff having sold sixty comb of rye to the defendant, to be delivered before Michaelmas, and having delivered fifty comb, brought his action for the amount of that parcel, and it was resolved by HALE, C. B. that though the agreement was entire, the several deliveries made several contracts ; and that though the payment was to be on the last delivery, yet a time being set for delivery, it was intended to be paid when the

delivery should have been ; and that the defendant must resort to his remedy as to the delivery of the residue. But in this case there might have been some evidence of the rye delivered by the plaintiff, being absolutely accepted by the defendant ; and of late years, there has been a strong inclination in our courts, as far as is consistent with the rules of law, to do substantial justice between the parties at once, without creating the necessity for a cross action : *Farnsworth v. Garrard*, ante, p. 624 (1 Camp. 38).

POOL v. BOUSFIELD.†

(1 Camp. 55—56.)

1807.
Dec. 9.

[55]

An agreement by the payee of a bill of exchange, to discharge a person liable upon it, in consideration that the latter would not move the Court of King's Bench against him for a misdemeanor, is illegal and void.

THE plaintiff declared as payee of a bill of exchange for 104*l.* 8*s.* drawn by one Mould on, and accepted by the defendant.

The defence was, that the plaintiff had discharged the drawer as to part of the bill, and the acceptor for the residue, knowing that the consideration had been *divided between them.—To establish this, Mould himself was offered, and upon argument admitted, as a witness. He proved the execution of an agreement, by which the plaintiff for good and legal considerations had released the sum of 54*l.* 8*s.* part of the money specified in the bill. He further gave in evidence, that upon his undertaking not to move the Court of King's Bench against the plaintiff, the latter engaged to discharge the acceptor as to the 50*l.* which he owed on this bill of exchange. [*56]

LORD ELLENBOROUGH asked what was the nature of the motion intended to be made?—If it was that the plaintiff might answer the matters of an affidavit?

The witness answering, that this was the object he had in view, and which he agreed to forego,

LORD ELLENBOROUGH said, the agreement was corrupt and invalid, and that therefore, *pro tanto*, the plaintiff must recover.

*Verdict for the plaintiff with 50*l.* damages.*

† In the judgment delivered by TINDAL, Ch. J. in *Keir v. Leeman* (Ex. Ch. 1846) 9 Q. B. 371, 394, 15 L. J. Q. B. 360, it is stated that this decision cannot be reconciled with the principle, which the Court thought a just one, that the reason for the consideration being illegal is that the prosecution is for a public misdemeanor and not for a private injury to the prosecutor. It is however

pointed out by CLEASBY, B. in *Brown v. Brine* (1875) 1 Ex. D. 5, 8, 45 L. J. Ex. 129, 33 L. T. 703, that in *Pool v. Bousfield*, it was an important feature in the case that the defendant was an attorney, and therefore an officer of the Court. The cases relating to public prosecutions are fully discussed in *Windhill Local Board v. Vint* (C. A. 1890) 45 Ch. D. 351, 59 L. J. Ch. 608, 62 L. T. 725.—R. C.

1807.
Dec. 12.

HURST v. WATKIS.

(1 Camp. 68—69.)

[68]

Although the plaintiff, after delivering a particular of his demand, cannot at the trial himself give evidence out of it, yet if the defendant's evidence shews that there were other items, which he might have included in his demand, he is entitled to recover all that appears to be due to him.

ASSUMPSIT for money had and received, and on an account stated.

The plaintiff and defendant were partners, and the action was brought to recover a balance due on a statement of accounts. There had been two sets of accounts kept between the parties;—one touching their partnership concerns, and another concerning some separate money transactions.

The plaintiff gave in evidence an account rendered by the defendant, wherein upon these separate transactions he had made himself a debtor to the plaintiff, to the amount of between 1,700*l.* and 1,800*l.* In answer to this, the defendant produced an account subsequently rendered by the plaintiff; according to which, on the same transactions, there appeared to be a balance due to the defendant. But on the opposite side of the page, was a statement of the partnership accounts, shewing a balance of above 3,000*l.* in favour of the plaintiff.

LORD ELLENBOROUGH said, the defendant had made the whole of this paper evidence, and must abide the consequences.

It was then objected, that the plaintiff could not go out of his particular, which confined him to the balance due on the separate accounts.

[69]

LORD ELLENBOROUGH :

If the plaintiff, ignorant of the nature and extent of his demand, has given an imperfect particular of it, to that he shall nevertheless be restricted in his own evidence, and he shall not be allowed directly to seek to recover any thing *ultra* the contents of the particular. But if the defendant, in attempting to defeat this

restricted claim, gives him a better case than he was at liberty to make for himself, he is now entitled to a verdict for all that is proved to be due to him: what he could not have insisted on as a right, he may receive as a boon. Here the joint account by an adjustment has become a separate one, and the balance due upon it is a liquidated debt, which the plaintiff may recover in the present action.

HURST
v.
WATKINS.

It was then agreed between the parties, that the plaintiff should take a verdict for 1,785*l*.

BROMLEY v. HESSELTINE.

(1 Camp. 75—77.)

1807.
Dec. 14.

Semble, that an insurance on goods the property of a neutral, to a port occupied by the enemy, is void.—But though a neutral should himself be resident in a place occupied by the enemy, an insurance on goods his property to a neutral or friendly port is valid.

[75]

ASSUMPSIT on a policy of insurance on goods on board the Danish ship *Gherard*, at and from Hull to Messina.—The declaration averred the interest to be in Joseph Chemin and Peter Della Longa & Co. subjects of the King of Tuscany.—Plea, the general issue.

The ship was captured on her voyage and carried into Algeziras, where her cargo was condemned for want of a certificate of neutrality.

The defence first attempted was, that the goods were destined, not for Messina, but Leghorn; and that, as Leghorn had been some time before permanently occupied by the French troops, an insurance on such a voyage by an English subject was illegal and void.† The only evidence in support of this was *an expres-

[76]

[*77]

† Mr. Serjeant *Marshall*, in his excellent book on the Law of Insurance, p. 38, cites *Rotch v. Edie*, 3 R. R. 222 (6 T. R. 413), as an authority to shew, "that a neutral, though

residing in the enemy's country, and carrying on trade there in partnership with an alien enemy, may insure his interest in the joint property." But, with very great sub-

BROMLEY sion in the bill of lading ; which stated, that the goods were to
v. be delivered to Joseph Chemin and Peter Della Longa & Co. in
HESELTINE. Leghorn. But the captain of the ship swore positively, that, though the consignees resided in Leghorn, he was proceeding when he was captured to Messina in Sicily, there to deliver the whole of his cargo.

Garrow for the defendant then objected, that it appeared at any rate that the consignees and owners of the goods, who were aliens, were residing in a place then in a state of declared hostility to this country ; and that as a trading by them under such circumstances certainly tended to the aiding and comforting of the King's enemies, it could not be legally covered by any insurance.

LORD ELLENBOROUGH :

I don't know that merely because an alien happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port, are on that account uninsurable. Suppose a British merchant to be entrapped and confined in

mission, such a doctrine cannot be deduced from that case. 1st, The plaintiff and Berard, the French subject, residing at L'Orient, were not partners but part owners ; "they had each a half concern and interest in the ships and their stores," and Berard's interest was insured by separate policies.—2ndly, France was not an enemy's country, either when the policy was effected, or when the loss happened. The policy was underwritten by the defendant in November, 1792, and the embargo was laid on, February 5th, 1793.—3rdly, The plaintiff could not be considered as a neutral residing in the enemy's country ; for shortly before making his insurances, he came to England, and though he went back to France previous to the commencement of hostilities and remained there about four months,

he then returned again to England, and resided here constantly afterwards. Lastly, the reason assigned for adjudging the policy to be valid was, that the consequence of allowing this objection would be, that it would be illegal to insure the property of a neutral (not in an "enemy's" port, as is supposed, but) in a foreign port. The view with which the defendant's counsel urged, that the plaintiff was domiciled in France, and owed a temporary allegiance to the French Government, was to shew, not that he adhered to our king's enemies, but that he could not lawfully insure against the acts of the government to which he owed allegiance, and that as his assent was to be implied to these acts, he could not take advantage of them against the underwriters.

an enemy's country, it can scarcely be said that all the trade he may still carry on is in aid of the King's enemies, illegal and incapable of being insured. BROMLEY
HESSELTINE.

The plaintiff had a verdict.†

PORTHOUSE v. PARKER AND OTHERS.

(1 Camp. 82—83.)

1807.
Dec. 14.

[82]

In an action against the drawers of a bill of exchange, drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn; and in such action it is unnecessary to prove that the drawers had notice of the bill being dishonoured.‡

THIS was an action against the drawers of a bill of exchange, for 461*l.* 3*s.* at the suit of the payee.

The bill purported to be drawn by one Wood, as the agent of George, James, and John Parker, upon John Parker. There was no proof that Wood had authority from the defendants to draw the bill; but a witness swore that he, as the agent of John Parker, the drawee and one of the defendants, had accepted it on his account.

Lord ELLENBOROUGH held, that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly *drawn; and further, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily have been

[*83]

† In *M'Connell v. Hector*, 6 R. R. 724 (3 Bos. & P. 113), the Court of C. P. held that an English subject who lives and carries on trade under the protection and for the benefit of an hostile state, is to be considered to all civil purposes as much an alien enemy as if he were born there. Vide *Gist v. Mason*, 1 R. R. 154 (1

T. R. 88); *Brandon v. Nesbitt*, 3 R. R. 109 (6 T. R. 23); *Bristow v. Towers*, 6 T. R. 35; *Casseres v. Bell*, 8 T. R. 166.

‡ See Bills of Exchange Act, 1832, s. 50 (2) (c). But the Act is not explicit as to the case in point; nor is the case cited by His Honour Judge Chalmers.—R. C.

PORTHOUSE known to one of them, and the knowledge of one was the know-
 v. ledge of all.
 PARKER
 and Others.

Verdict for the plaintiff.†

1807.
 Dec. 15.

WARING AND OTHERS v. FAVENCK AND OTHERS.‡

(1 Camp. 85—87.)

[83]

If goods are bought by a broker, who does not mention his principal until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor.

ASSUMPSIT for goods sold and delivered. Plea, the general issue.

[*86] In June last, the plaintiffs employed Messrs. Kymer & M'Tagart as brokers, to sell for them 62 bags of coffee. They sold the whole of it accordingly to *Messrs. Kenyon & Son. The latter were likewise brokers, and actually bought this coffee for Messrs. Favenck & Co. the defendants. At the time of the sale, however, Kenyon & Son did not mention that they were purchasers for other persons; and until after they had become bankrupts, it was not known who their principals were. Kymer & M'Tagart had at first entered in their books, "Bought of Waring & Co. 62 bags of coffee, &c. on account of Kenyon & Co."—they then added, "For Favenck & Co." Kenyon & Son, at the time of their bankruptcy, which happened before the sum to be paid for the coffee was due, were indebted to the defendants to a greater amount.

† JONES and another v. RADFORD.
 K. B. Sit. after H. T. 46 Geo. III.
 (1 Camp. 83.)

Action by the indorsee against the acceptor of a bill of exchange, payable to two persons, of the names of Hopkins and M'Michell. The bill had been indorsed by Hopkins in the name of himself and M'Michell, and defendant had accepted it with this indorsement upon it. The defence was, that the payees were not partners, and that the bill ought therefore

to have been indorsed by both: *Carwick v. Vickery*, Doug. 653. But Lord ELLENBOROUGH held, that the defendant having accepted the bill indorsed by one for himself and the other, could not now dispute the regularity of this indorsement.

‡ Explained and distinguished in *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, 26 L. T. 872. See also *Kymer v. Suwercroft*, p. 646, *post*, and *Favenc v. Bennett*, p. 425, *ante*.—R. C.

The *Attorney-General* contended, that under these circumstances, the plaintiffs had no right to recover in the present action; as the defendants were entitled to set off the price of the coffee against the debt due to them from Kenyon & Son. Had the credit been originally given to the defendants, or had they been mentioned as the principals before the insolvency of Kenyon & Son, he allowed they would have been still responsible; but in fact they were left to suppose, as no farther enquiries were made by the plaintiffs or their brokers, that Kenyon & Son alone would be looked to for payment, and were thus induced to allow a large balance to remain in their hands, which they would otherwise have withdrawn.

WARING
and Others
v.
FAVENCK
and Others.

Park for the plaintiffs denied that the doctrine of set-off had ever been carried farther than in *George v. *Clagett*,† where it was held, that if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set-off any demand he may have on the factor against the demand for the goods made by the principal. But it was impossible that there should be any right of set-off as between the buyer and his own broker.

[*27]

LORD ELLENBOROUGH considered, that as the purchase had been made for the defendants by their agents, it was the same as if it had been made directly by the defendants themselves; and that this was therefore the common case of goods sold and delivered.

Verdict for the plaintiffs.‡

† 4 R. B. 462 (7 T. R. 359).

‡ Vide *Rabone v. Williams*, and *Stracey v. Day*, 4 R. B. 463 n. (7 T. R. 360, 361); *Scrimshire v. Alderton*,

2 Stra. 1182; *Escot v. Milward*, Sittings after M. T. 24 Geo. III. 1 Esp. Ni. Pri. 106; *Kymer v. Suwercroft*, *post*, p. 646.

1807.
Dec. 16.

GRAFF AND OTHERS, ASSIGNEES OF D. J. VANDER
HOEVEN, A BANKRUPT, v. GREFFULHE.

(1 Camp. 89—91.)

[89]

A trader on receiving bills of exchange from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming insolvent, but before committing an act of bankruptcy, delivers these bills, with the consent of his other creditors, to an agent of the person who had remitted them, for the use of the latter if he should be ultimately entitled to them. This is a legal and valid transaction, and if a commission of bankrupt afterwards issues against the trader, his assignees cannot maintain an action against the trustee to recover the produce of the bills.

ASSUMPSIT for money had and received, &c. The declaration contained two sets of counts; one laying the promise to the bankrupt before his bankruptcy, and the other to the plaintiffs his assignees. Plea, the general issue.

D. J. Vander Hoeven established himself as a merchant in London in the year 1800; and from thence till the time of his bankruptcy had various dealings with the house of Vander Hoeven & Co. of Amsterdam. In December, 1804, he consigned a parcel of sugars to them, to be sold on his account. On the 24th day of that month, he received a remittance from them by the post of three bills of exchange on different persons in London, value together, 487*l.* 14*s.* 11*d.* in a letter, in which they say, "according to your desire, we remit you inclosed against the consignment of sugar for your account 487*l.* 14*s.* 11*d.*, as per note, making to your debit 5,714,, 8 guilders, with which, please to do the needful, and to credit us in conformity." Two days before D. J. Vander Hoeven had stopped payment; but he did not commit any act of bankruptcy till the October following. On the 7th of January, 1805, a meeting of his creditors was held at his house, when it was agreed, "that the remittances which had been made by Vander Hoeven & *Co. of Amsterdam to D. J. Vander Hoeven since he stopped payment, should be delivered to Mr. Greffulhe, for him to receive the money, and hold it for the persons who might be ultimately entitled to it." The bills had been previously delivered by D. J. Vander Hoeven to the defendant, who was the agent in London of Vander

[*90]

Hoeven & Co. for their use and on their account. The defendant accordingly received payment of the bills as they respectively became due. A commission of bankrupt issued against D. J. Vander Hoeven, on the 30th of October, 1805. At the time when he consigned the sugar and received the remittance, he was, and afterwards continued, indebted to Vander Hoeven & Co. beyond the amount of the proceeds of the sugar, and beyond the value of the remittance.

GRAFF
and Others
v.
GREFFULHE.

It was proposed to take a verdict for the plaintiffs subject to the opinion of the Court of King's Bench upon a case reserved. But,

Lord ELLENBOROUGH said, he could not grant a case, having so clear an opinion on the subject. These bills did not pass to the assignees as part of the effects of the bankrupt at the time of his bankruptcy. He had parted with them previously, and the possession of the defendant could not be construed as his possession. Vander Hoeven & Co. being his creditors to a larger amount, were ultimately entitled to them, and were the persons for whose use and benefit they had been deposited with the defendant. A payment of the money, therefore, to Vander Hoeven & Co. would *have reference back to the time of the deposit of the bills, when D. J. Vander Hoeven might have himself directly returned them to Amsterdam.

[*91]

The plaintiffs were nonsuited, with leave to move to set aside the nonsuit, and enter a verdict.†

† Vide *Atkins v. Barwick*, 1 Stra. 165; *Rust v. Cooper*, Cowp. 629; *Harman v. Fisher*, Cowp. 117; *Inglish v. Grant*, 5 T. R. 530; *Singleton v. Butler*, 5 R. R. 593 (2 Bos. & P. 283).
Nixon v. Jenkins, 2 H. Bl. 135;

1807.
Dec. 17.

ROWORTH v. WILKES.

(1 Camp. 94—99.)

[94]

If an article in a general compilation of literature and science copies so much of a book, the copyright of which is vested in another person, as to serve as a substitute for it; though there may have been no intention to pirate it or to injure its sale; this is a violation of literary property, for which an action will lie to recover damages. The proprietor of a print may maintain an action against any person who pirates it, although his name is not inscribed on it pursuant to the directions of stat. 8 Geo. II. c. 13, § 1.

ACTION on the case for pirating a book and certain prints contained in it.

The first count of the declaration stated, that the plaintiff was the author and proprietor of the copyright of a certain book, first published within fourteen years last past, entitled, "The Art of Defence on Foot with the Broadsword, &c." and had printed and published for sale divers, to wit 500 copies thereof; yet that the defendant wrongfully and injuriously published, exposed to sale, and sold divers, to wit 8,000, copies of a certain other book or work, entitled "Encyclopædia Londinensis, or an universal Dictionary of Arts and Sciences and Literature," which had been before that time wrongfully and injuriously copied from the said book of the plaintiff without his consent. The eleven following counts were nearly the same; some of them omitting to state that the plaintiff had published the one work, or that the defendant had sold the second; others stating that the defendant had copied great part of the plaintiff's work, and exposed his work to sale, without the plaintiff's consent; and others averring only that the plaintiff was lawfully entitled to, and had the sole right of printing the work in question. The thirteenth count stated that the plaintiff after the 24th day of June, 1777, mentioned in a certain Act of Parliament, made, &c. entitled, &c. (17 Geo. III. c. 57) to wit, on, &c. was *and from thenceforth hitherto hath been and still is the proprietor of certain prints, which had been theretofore etched in Great Britain, that is to say, of a certain print entitled "Inside Guard," also of a certain other print, &c. and the said plaintiff during all the time aforesaid had been and was lawfully entitled

[*95]

ROWORTH
v.
WILKES.

to, and still has and is lawfully entitled to the sole right and liberty of printing and reprinting the said prints, to wit at, &c. yet the said defendant well knowing the premises, but disregarding the statute in such case made and provided, and contriving, &c. to injure the said plaintiff so being the proprietor of the said prints as aforesaid ; after the said 24th day of June in the year 1777, and whilst the said plaintiff was such proprietor of the said prints as aforesaid, to wit, on, &c. and on divers, &c. at &c. aforesaid did publish and cause, &c. divers, to wit 3,000 copies of each of the said prints, whereof the said plaintiff so was proprietor as aforesaid, without the consent of the said plaintiff and against his will ; by means of the committing of which said last mentioned grievances he the said plaintiff hath been and is greatly injured in his said property in the said prints, and hath lost and been deprived of divers great gains, &c. to wit, at, &c. aforesaid. The last count was exactly the same, stating only that the defendant exposed the prints to sale.

It appeared in evidence that the plaintiff published the first edition of his treatise on fencing, illustrated with engravings in the year 1798, and that it contained considerable novelty, particularly in uniting the Austrian and Highland methods of using the broad *sword. In 1804 he published a third and improved edition, consisting of 118 pages and a considerable number of new plates, at half a guinea a copy. The plates had not his name upon them as the Act directs, but that of Egerton the bookseller. The defendant is editor and proprietor of the *Encyclopædia Londinensis*, a work which has been for some time coming out in numbers. Proceeding in alphabetical order, in 1805 he had arrived at the head "Fencing ;" when he published a number with this title, containing seventy-five pages of the plaintiff's treatise, and three engravings, representing figures in exactly the same attitudes with the plaintiff's, but disguised by a different costume. About 2,000 of this number of the *Encyclopædia* were sold at eight-pence a copy ; which was not beyond the usual sale of the work.

[*96]

The *Attorney-General*, of counsel for the defendant, allowed, that if the number of the *Encyclopædia* upon "Fencing" had

ROWORTH
v.
WILKES.

been published as a separate and distinct treatise, it might have been considered a piracy of the plaintiff's book, for which an action would lie; but contended that, as it formed only a small part of a great compilation of literature, it was no invasion of copyright of which the plaintiff could complain in a Court of justice. There was here no intention to meet the plaintiff's work in the market, and there was no good reason to suppose that the sale of it had been in any degree impaired. In a dictionary of all arts and sciences the compiler was justified in taking larger extracts than in another work of the same description with that copied. The public were thus benefited, and no individual *suffered; since people would never purchase the whole of a voluminous compilation as a substitute for a short treatise on any particular art or science. There could be here no intention whatever to pirate the plaintiff's work, any more than if the defendant had published a few extracts from it in criticising it in a review. With respect to the three prints, supposing that they were copied from the plaintiff's, there was a preliminary objection in point of law to his recovering. His name was not engraved upon them. It was only the statute that rested a property in prints in the publisher; and that, as a condition, required his name to appear upon them. The plaintiff therefore had no legal remedy under the statute, having neglected to comply with the conditions prescribed by it.† But farther, notwithstanding the resemblance of the two sets of plates, the one could not be considered as copies of the others, since each guard in fencing was such a positively defined position, that the attitudes of men practising it must necessarily be the same; nor could these prints be such as were meant to be *protected by the statute; as

[*97]

[*98]

† The stat. 8 Geo. II. c. 13, § 1, vests the property of certain prints in the inventors' designers, &c. for 14 years from the day of publishing, "which shall be truly engraved, with the name of the proprietor, on each plate, and printed on every such print;" and inflicts on other persons printing the same without the consent of the proprietor, the penalty of forfeiting the plate, the sheets on

which the prints are copied, together with 5s. for every print, &c. The 7 Geo. III. c. 38, extends to prints taken from any pictures, models, &c. and enlarges the right to twenty-eight years, without requiring any name to appear on the print; and the 17 Geo. III. c. 57 gives a special action on the case to recover damages; which appears to have been *ex abundanti cautela*.

they were merely accessory to the letter-press, like the diagrams in Euclid.

ROWORTH
v.
WILKER.

LORD ELLENBOROUGH :

This action is brought for prejudice to a work vested in the plaintiff ; and the question is, whether the defendant's publication would serve as a substitute for it ? A review will not in general serve as a substitute for the book reviewed ; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort ; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind may differ from a treatise published by itself ; but there must be certain limits fixed to its transcripts ; it must not be allowed to sweep up all modern works ; or an Encyclopædia would be a recipe for completely breaking down literary property. Here 75 pages have been transcribed out of 118, and that which the plaintiff sold for half a guinea may be bought of the defendant for eightpence. As to the prints, the question will be, whether the defendant has copied the main design ? Although the plaintiff's name is not engraved upon them, if there has been a piracy, I think the plaintiff is entitled to a verdict on the two last counts of the declaration. The interest being vested, the common law gives the remedy. I have always acted on the case of *Beckford v. Hood* ; † in which the Court of *King's Bench held, that an author, whose work is pirated, may maintain an action on the case for damages, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. But it is still to be considered whether there be such a similitude and conformity between the prints, that the person who executed the one set must have used the others as a model. In that case he is a copyist of the main design. But if the similitude can be supposed to have arisen from accident ; or necessarily, from the nature of the subject ; or from the artist having sketched designs merely from reading the letter-press of

[*99]

† 4 R. R. 527 (7 T. R. 620).

BOWORTH
v.
WILKES.

the plaintiff's work,—the defendant is not answerable. It is remarkable however, that he has given no evidence to explain the similitude or to repel the presumption which that necessarily causes. His Lordship said he would save the point as to the directions of the statute not being complied with; and therefore directed the jury to find separate damages for the letter-press and the prints.

The plaintiff had a verdict, with 70l. for the former, and 80l. for the latter.†

1807.
Dec. 18.
[109]

KYMER AND OTHERS v. SUWERCROPP.‡

(1 Camp. 109—112.)

If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he has previously paid the price of the goods to the broker. *Secus*, if the day of payment is allowed to pass by, without any demand being made upon the principal. Although goods are stopped *in transitu*, the vendor, after the credit has expired, may recover for them, under a count for goods bargained and sold, if he was ready to deliver them on the price being paid.

ASSUMPSIT for goods sold and delivered, and for goods bargained and sold. Plea, the general issue.

On the 10th, 17th, and 24th days of June last, and on the 1st day of July, the plaintiffs sold by public auction to Messrs. Kenyon & Co. coffees to the value of about 1,100l. By the conditions of sale, the goods were to be paid for on delivery, and were to be weighed and taken away within one month from the day of sale. These coffees were bought by Kenyon & Co. as

† *Vide* stat. 8 Ann. c. 19. *Donaldson v. Becket*, 7 Bro. P. C. 88; *Millar v. Taylor*, 4 Burr. 2380; *Chapman v. Pickersgill*, 2 Wils. 145; *Tonson v. Collins*, 1 Blac. Rep. 330; *Thompson v. Symonds*, 2 R. R. 526 (5 T. R. 41); *Cary v. Longman*, 6 R. R. 285 (1 East, 358).

‡ See the case (along with *Waring v. Favenck*, p. 638, *ante*), discussed and distinguished, in *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 598; 41

L. J. Q. B. 253, 26 L. T. 872; see also the judgments in *Irvine v. Watson* (1879) 5 Q. B. D. 102, 414; 49 L. J. Q. B. 239, 531, 42 L. T. 51, 810; and *Davison v. Donaldson* (1882) 9 Q. B. D. 621, 47 L. T. 564. Lord Justice BOWEN observes (9 Q. B. D. 630) that these judgments are consistent with Lord ELLENBOROUGH's judgment in the above case, though they certainly narrow the application of the latter part of it.—B. C.

brokers for the defendant ; which was not known to the plaintiffs till the 8th of July, on which *day Kenyon & Co. became insolvent. A great part of the coffee had previously come to the defendant's hands, the warrants for the delivery of it from the West India Docks, having been given him by Kenyon & Co., who had received them from the plaintiffs. For so much he paid Kenyon & Co. by accepting a bill, dated 15th June, drawn by them upon him, for 75*l.* at one month after date, which was satisfied when it became due. The residue of the coffee was stopped by the plaintiffs *in transitu*. However, at the expiration of one month from the different sales respectively, (called the days of prompt), they sent a clerk to demand payment of the defendant. The clerk on one of these occasions offered, on being paid, to give him the remaining warrants, although he had them not at that time about him ; but the defendant refused to pay, saying, he was advised by his attorney he was not liable.

KYMER
and Others
v.
SUWER-
CROPP.

[*110]

Park now contended, that the action could not be supported, either for one parcel of coffee or for the other. As to the first he argued, that, though in general upon a sale to a broker, the vendor may come upon the principal when discovered ; the doctrine must be taken with this qualification, that the principal has not previously paid the price of the goods to his broker. But, it would be a monstrous injustice to permit the vendor, after giving credit to the broker alone, and after lying by till the latter receives the money from the principal, to resort to the principal who has already paid. Here the defendant would have been liable to the plaintiffs to a certain extent, had they intervened in time ; but it was too late, after *inducing him to pay to the person who had bought the goods for him, under the idea, that they were satisfied with the solvency of the broker, and did not look beyond him. As to that part of the coffee which had been stopped *in transitu*, the plaintiffs could not recover the value of it, either under the count for goods sold and delivered, as it had not been delivered, or under the count for goods bargained and sold, as the warrants had not been regularly tendered to the defendant. To render this bargain and sale binding on him, it was incumbent on the plaintiffs to enable him

[*111]

KYMER
and Others
v.
SUWER-
CROPP.

to enjoy the benefit of it; but in fact, the goods had been completely withheld from him, and the contract had been thereby rescinded.

The *Attorney-General* on the other side, insisted that this case could not be distinguished from *Waring v. Favenck*.† The goods being sold to be paid for at certain days, the plaintiffs had no concern with any transactions between the parties till those days arrived. It might be an act of kindness in the defendant, to give this acceptance to Kenyon & Co. on the 15th of June; but if it was a payment for the coffees, it was a payment in his own wrong. If the day of prompt had been suffered to pass by without any demand being made on the defendant, the case would have been altered; but to hold him discharged under the actual circumstances, would be to allow a set-off between him and his own broker. The defendant's refusal to pay for the goods stopped *in transitu* dispensed with a tender of the warrants.

[112] LORD ELLENBOROUGH :

A person selling goods is not confined to the credit of a broker who buys them; but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be, were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition, that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker, on account of this deception, the principal shall be discharged. But here payment was demanded of the defendant on the several days it became due, and no reason was given him to believe that his broker alone was trusted. He has received a great part of the coffee, and enjoyed the benefit of it; the right of the vendors is entire, unless he has paid them, or some person authorized by them to receive payment; Kenyon & Co. had no such authority; therefore he is still liable. The rest of the coffee was stopped, only to prevent its getting into the

† *Ante*, p. 638.

hands of the insolvent brokers; and as payment was to precede the delivery, it was enough if the plaintiffs, on being paid, were ready to have delivered it.

KYMER
and Others
v.
SUWER-
CROPP.

Verdict for the plaintiffs.

It is mentioned in an *addendum* to the report (1 Camp. 180 c) that a rule for a new trial was discharged,—on the ground that the defendant had not properly substantiated the fact, that he had paid the broker for the coffee delivered to him; but the Court did not give any decided opinion as to the effect of payment by the vendee to the broker before the day of prompt, when the warrants for the delivery of the goods have been parted with by the vendor and passed to the vendee.

HIBBERT v. SHEE AND ANOTHER.

(1 Camp. 113—115.)

1807.
Dec. 19.

[113]

In the sale of goods by sample, if the bulk does not accord with the sample, the purchaser is not bound to accept or pay for the goods, on any terms; although no fraud was intended on the part of the vendor, and although the custom may have been that, under such circumstances, the bargain shall stand good, upon an allowance being made for the inferiority.†

ASSUMPSIT for goods bargained and sold. Plea, the general issue.

At a public sale, on the 9th of April last, the defendants purchased of the plaintiff, by sample, sixteen hogsheads of sugar, at eighty shillings per cwt. On examining the sugars purchased, it was found that they by no means corresponded in colour with the samples; and in the opinion of the brokers who then saw them, they were less valuable by five or six shillings a hundred weight. The plaintiff, nevertheless, required that the defendants

† The principle of this judgment is assumed in many later cases; see in particular *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438, 41 L. J. C. P. 228, 27 L. T. 336; and *Couston v. Chapman* (H. L. Sc. 1872),

L. R. 2 H. L. Sc. 250. But Lord ELLENBOROUGH's judgment is perhaps the most explicit statement of the principle, that correspondence with the sample is of the essence of the contract.—R. C.

HIBBERT
v.
SHEE
and Another.

should take the sugars, on being allowed a compensation for the inferiority; insisting that, according to the usage of the trade, where samples have been drawn without fraud, and the bulk notwithstanding proves inferior, sworn brokers are to be called in to estimate the difference, and the vendor making an allowance for this, the purchaser must stand to his bargain. The defendants refused to accede to this proposal; as they alleged the sugars were unfit for the purpose for which they had bought them.

[*114]

It appeared that the hogsheads of sugar in question arrived in the West India Docks in the end of November, 1806, and that in pursuance of the Dock Act, as they were landed, samples were taken, which were the samples exhibited at the sale on the 9th of April following. From being exposed to the air during this long interval, they had become much whiter than *when originally taken, or than fresh samples drawn on the 11th of April; although the latter, on being produced to the jury, now appeared nearly of the same hue. The witnesses stated, that both were of equal grain, and likely to contain the same quantity of saccharine matter, so that at the time of the sale they would have been of equal value to the sugar baker; but that for retail much more depends upon the colour than the quality. The Act of Parliament enables the importer of sugars at any time to obtain fresh samples; while the purchaser at a public sale has no means of knowing when the samples exhibited have been drawn.

The plaintiff's counsel rested their case chiefly on the usage; which, they contended, must govern and explain the contract between the parties. In support of it, several brokers of great experience were examined, who swore, that making an allowance for the difference was the common mode of settling disputes of this kind; although they had known a few instances where, by consent, the sugars had been returned to the vendor.

LORD ELLENBOROUGH:

The question here is, whether the contract has been substantially performed. Does the sugar accord with the sample exhibited at the sale? If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensa-

tion for the dissimilarity. This is not a performance of the contract. And though there should prevail an habitual mode of arrangement between dealers in the article, I have always a right to say, "is this what I meant to purchase?" A spirit of *candour and accommodation may lead to a compromise between the parties; but the legal mode of dealing is, that, if the article agreed on is not furnished, I may reject it and keep my money in my pocket. It appears, that with respect to sugars, there will be a difference between the bulk and the sample, where the sample has been for some time exposed to the air; and if the party had full notice when the sample was drawn, he might be expected to calculate upon the difference; but all that is communicated at these sales is, that the sugars of which samples are produced lie in the docks, and the bidders have a right to presume that the samples have been recently drawn. Did the sugar in question then accord in quality with the sample, and was it fit for the purposes in the contemplation of the purchasers?†

HIBBERT
v.
SHEE
and Another.

[*115]

Verdict for the defendants. †

† Probably all that is meant by the question as to fitness, is to test the materiality of the want of accordance in quality.—R. C.

‡ The principle of this case has been applied to many other contracts. Thus, in insurance, a material concealment, even from accident, negligence, inadvertency or mistake, is fatal to the policy; nor can the assured, by tendering any increase

of premium, require the underwriters to confirm it. The risk is not that bargained for. *Carter v. Boehm*, 3 Burr. 1909; *Ratcliffe v. Shoolbred*, Park, 181; Marshall, 349. Emerig. t. 1, p. 20. [The requirement of *uberrima fides* in contracts of insurance is now regarded as founded on the special nature of the contract.—F. P.]

1807.
Dec. 19.

BECKWITH AND OTHERS v. SYDEBOTHAM.

(1 Camp. 116—119.)

[116]

If the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of insurance upon her, at and from the foreign port to a port in England; unless information on the subject be particularly called for.†

ASSUMPSIT on a policy of insurance, on the ship *Earl of Wycombe* and her cargo, at and from Pictou in Nova Scotia to Liverpool.

The ship having arrived at Pictou on the 10th of May, 1803, sailed on her homeward-bound voyage on the 2nd of September; but meeting with stormy weather was obliged to put into Halifax on the 9th of October, so disabled as to be unfit to prosecute the voyage. The policy was executed on the 19th of June.

The first defence set up by the underwriters was, that the ship when she sailed from Pictou was not seaworthy.

[After evidence being given upon this point, including the evidence of experts which was allowed by Lord ELLENBOROUGH to be admissible:]

[117]

The *Attorney-General* insisted, that at the time of effecting the policy there had not been a proper disclosure to the underwriters. Immediately before this, a letter had been received from the captain of the ship, dated at Pictou, on the 11th of May; in which he *states the damages he had encountered on the outward-bound voyage, and describes the ship as being then unseaworthy, and standing in need of a great many repairs. The *Attorney-General* allowed that after the decision in *Haycard v. Rogers*,‡ whatever forms an ingredient in seaworthiness need not be disclosed by the assured to the underwriter, unless informa-

[*118]

† *Secus*, where the delay would materially vary the risk. *De Wolf v. Archangel, &c. Co.* (1874) L. R. 9 Q. B. 451, 43 L. J. Q. B. 147, 39

L. T. 605. Also *Hull v. Cooper* (1811) 14 East, 479, reported 12 R. R. —R. C.

‡ 7 R. R. 638 (4 East, 590).

tion on the subject is particularly called for ; as an assured impliedly warrants the ship to be seaworthy. But still there must be a disclosure of every circumstance which will increase the risk ; and if the contents of this letter shewed the risk to be greater than the underwriters might otherwise have reasonably supposed, then it ought to have been communicated to them, for the purpose of enabling them to apportion the premium, although not for the purpose of informing them as to the seaworthiness of the vessel. But it was clear that from the very disabled state in which the *Earl of Wycombe* was described to have been on her arrival at Pictou, she must be detained there to be repaired much longer than would be necessary to take in her cargo, even if she should at last sail in a state of complete equipment ; and that the risk which the underwriters were led to consider as a summer risk, would be turned into a winter one, which was much more dangerous, and from which the loss had actually happened.

The letter was given in evidence, and it was allowed that it had not been communicated when the policy was effected.

Lord ELLENBOROUGH upon this part of the case said, that if it was necessary to have disclosed this letter as governing the time when the ship would sail, it would in all cases be necessary to inform the underwriters where any repairs were wanting ; and he believed it very frequently happened, that a ship must have something done to her before she would sail on her homeward-bound voyage. If the underwriters wished to have particular information upon this subject, they ought to ask for it ; and if they were disposed only to insure a voyage made during a particular season of the year, they should (as was commonly done with Jamaica ships) insert a warranty in the policy, that the ship shall sail on or before a certain day. He therefore thought the communication of the captain's letter as little necessary, to shew the probable stay of the ship at Pictou, as to shew whether she was seaworthy before the commencement of the voyage.

The plaintiffs had a verdict.

BECKWITH
and Others
v.
SYDE-
BOOTHAM.

[119]

1807.
Dec. 19.

WAITHMAN AND ANOTHER v. WAKEFIELD, Esq.†
(1 Camp. 120—122.)

[120]

Although a husband is not cohabiting with his wife, yet if she improvidently takes up goods of a tradesman, for which he would not otherwise be liable, he assents to the contract, if having any control over the goods, he does not cause them to be returned to the vendor. A husband is liable for necessities furnished to his wife suitable to the appearance in life he permits her to assume, though greatly beyond his degree or his circumstances. But if a tradesman trusts a married woman, deceived by the false appearance she assumes, when by cautious enquiries he might have ascertained her real situation, he cannot come upon the husband beyond the extent to which those enquiries would have shown him to be responsible.

ASSUMPSIT for goods sold and delivered. Plea, the general issue.

The plaintiffs are linen drapers in Fleet-street, and brought this action against Mr. Wakefield, a barrister at law, to recover the sum of 34*l.* 13*s.* being the value of certain articles of dress supplied to his wife.

The goods in question were furnished in the end of December, 1805, at a time when the defendant did not cohabit with his wife, but occasionally saw her. When she ordered them of the plaintiffs, she called at their shop, attended by a man dressed as a livery servant, and talked of her husband having just taken a new house, which he was about to fit up in a style of elegance. She herself was then living in furnished lodgings, having without his knowledge removed from a boarding house in which he had placed her. Soon after she had the things, a clerk of the plaintiffs called upon her, and insisted upon either having them back again, or being immediately paid for them. Upon this occasion the defendant was present, and he wished that all the articles should be returned; but Mrs. Wakefield using very violent language refused to give up any part of them. They consisted of materials for making up eight or ten fashionable dresses.

† This ruling of Lord ELLENBOROUGH cannot be omitted as unimportant, although he probably states the legal presumption more strongly against the husband than is warranted by the whole train of

authorities. The ruling case among modern authorities is *Debenham v. Mellon* (C. A. 1880) 5 Q. B. D. 394, 49 L. J. Q. B. 497, 42 L. T. 577; and (H. L. 1880) 6 App. Ca. 24, 50 L. J. Q. B. 155, 43 L. T. 673.—R. C.

The defence was, that these goods were neither necessities, nor suitable to the circumstances of the defendant; and that therefore, as he was not living with his wife when they were supplied to her, he was *not liable for them. In support of this, it appeared that shortly before, she had a well-furnished wardrobe for a lady in the middling rank of life, which the Judge held the jury might presume to have been given her by her husband; and that his whole income amounted to one hundred pounds a year, allowed him by his brother.

WAITHMAN
and Another
v.
WAKEFIELD.

[*121]

LORD ELLENBOROUGH :

Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is in general, only liable for such necessities as from his situation in life it is his duty to supply to her. But even where they are parted, if the husband has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause them to be returned, he adopts her act, and renders himself answerable. Nor is it any excuse in law, that the wife is unmanageable and disobedient; as he must be supposed to exercise his marital rights and to regulate her conduct. Therefore, if when the plaintiff's clerk in this case required the goods to be delivered back, they had not been eloiigned, but were at that moment in the house, it was the defendant's duty to have compelled the redelivery, and the plaintiffs are entitled to a verdict. Again, however low a man's circumstances may be, if he allows his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived, *the loss must fall upon him who connived at the deception. Whatever may be the husband's degree, he sends his wife out into the world with a credit corresponding to the rank in life in which, by his sanction, she affects to be placed; and if the present defendant was at all privy to his wife's going about attended by a footman, and pretending to be in a state of affluence, he may be liable to a greater extent than if he had

[*122]

WAITHMAN
and Another
v.
WAKEFIELD.

confined her to a mode of life suitable to his narrow fortune. However, it is the duty of tradesmen to make enquiries before trusting a married woman who is a stranger to them ; and the plaintiffs do not seem to have taken the pains they were bound to do, to ascertain the defendant's responsibility. Therefore, as they have trusted his wife for want of information which might easily have been obtained, if they receive a verdict at all, their demand should be reduced to the charge for necessaries suitable to the circumstances of the defendant.

The jury notwithstanding gave the plaintiffs a

Verdict for the full sum of 34l. 13s.

1807.
Dec. 21.

GORDON v. RIMMINGTON.

(1 Camp. 123—124.)

[123]

If the captain of a ship insured burns her, to prevent her from falling into the hands of the enemy, this is a loss by fire within the meaning of the policy.

THIS was an action on a policy of insurance on the plaintiff's commission and privileges as captain of the ship *Reliance*, from Bristol to the coast of Africa, during her stay and trade there, and from thence to all or any of the West India Islands. The declaration stated the loss to be by fire, in order to prevent the vessel and her cargo from falling into the hands of the King's enemies.

The *Reliance* sailed from Bristol on the 4th of May, 1804, and arrived on the coast of Africa about the middle of June. On the 24th of that month, being then in the river Gambia, she was chased by a French privateer, of greatly superior strength. She tried to escape ; but finding that the privateer rapidly gained upon her, the captain and crew discharged her guns down her hatchways, and having set her on fire in several places, rowed ashore in the long boat.

The facts were not disputed ; and the only question was, whether this was a loss by fire and within the perils insured against ?

LORD ELLENBOROUGH:

GORDON

v.

BIRMINGHAM.

The case is new; but I am clearly of opinion, that the plaintiff is entitled to recover. Fire is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed *by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor can it make any difference whether the ship is thus destroyed by third persons, subjects of the King, or by the captain and crew acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy. [*124]

Verdict for the defendant.†

HERBERT v. CHAMPION.†

(1 Camp. 134—137.)

1807.

Dec. 21.

[134]

An underwriter who, upon a full disclosure of facts, has signed his initials to an adjustment on the policy, without paying the loss, is not precluded afterwards, in an action against him, from taking advantage of circumstances, with which he had been made acquainted, before signing the adjustment. *Qu.* As to the effect of an adjustment when declared on specially?

ASSUMPSIT on a policy of insurance on the ship *Ganges*, to and from the Southern Whale Fishery.

The ship sailed from the Downs, under convoy of the *Fury* sloop of war, on 12th December, 1805, for Portsmouth, and before her arrival there was captured by a French privateer. The defence was, that a letter from the captain, dated 5th December, stating, that he was to sail under convoy of the *Fury*, though received on the 6th of that month, had not been com-

† Although this point of insurance law be new in England, it has long been decided in foreign countries that, as the master is justified in burning the ship under such circumstances, the insurer is liable for the loss. Pothier, h. t. n. 53; Valin, art. 26, h. t. So it has been held, that the insurer is liable, if a ship is

burnt, without any fault in the master, from an apprehension that she has the plague on board, and to prevent the infection from spreading. Emerigon, tom. i. p. 434.

† See on similar point *Shepherd v. Chewter*, p. 681, *post*, 1 Camp. 274, and note of the original reporter at end of that case.—E. C.

HERBERT
v.
CHAMPION.
[*135]

municated to the underwriter before effecting the policy, which was *not till the 12th or 18th of January; all the broker then said, having been, that the ship had sailed about three weeks. This letter, it was contended, would have induced them to make inquiries whether the *Ganges* had reached Portsmouth, and would have shewn her to be a missing ship.

To this, two answers were given on the other side: 1st, The defendant on 12th March, 1806, after reading the letter in question, together with several others, subsequently written by the captain while a prisoner at Verdun and giving a full account of all the circumstances of the case, had adjusted the policy as for a total loss, and put his initials on the back of it; which is considered tantamount to an order for the money.—2ndly, It was denied that the letter of 5th December was at all material to be communicated.

[*136]

Park for the plaintiff, as to, the first point contended, that an adjustment made on a full disclosure of facts which even might have been an answer to an action on the policy, was conclusive. In *Hogg v. Gouldney*,† *LEE*, Ch. J. was of opinion, that an adjustment was like a note of hand, and that it lay upon the party who disputed it to shew that it had been obtained by fraud. This rule had been since relaxed; but in *Rodgers v. Maylor*,‡ Lord KENYON said, he did not think it necessary to declare on the adjustment specially, and that it was *primâ facie* evidence against *the defendant. And in the late case of *Bilby v. Lumley*,§ the Court of K. B. held, that money paid by one with full knowledge of all the circumstances, cannot be recovered back again, on account of such payment having been made under an ignorance of the law.

The *Attorney-General* denied that the last case was in the slightest degree in point; as the money had there been actually paid. The distinction was between a payment, and a mere adjustment of the loss. In *Rodgers v. Maylor*, Lord KENYON said, if there had been any misconception of the law or fact,

† Beawes, *Lex Mer.* 310.

‡ *Park Ins.* 8th ed. 267.

§ 6 R. R. 479 (2 East, 469).

upon which an adjustment had been made, the underwriter was not absolutely concluded by it; and in *De Garron v. Galbraith*,† in which the whole Court held, that if after an adjustment, the underwriters suspected the honesty of the transaction, the plaintiff must produce other evidence; the same Judge observed, that shutting the door against enquiry after an adjustment, would be putting a stop to candor and fair dealing amongst the underwriters.

HERBERT
v.
CHAMPION.

LORD ELLENBOROUGH: •

There are two questions here to be considered: 1st, As to the conclusiveness of the adjustment; 2ndly, As to the materiality of the letter.—1st, The cases are clearly distinguishable, where, upon a dispute, the money is paid, and where there is only a promise to pay. If the money has been paid, it cannot be recovered back, without proof of fraud; but a promise to pay will not in general be *binding, unless founded on a previous liability. What is an adjustment?—An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case after admitting his liability; but until he has paid the money, he is at liberty to avail himself of any defence, which the facts or the law of the case will furnish. 2ndly, Respecting the letter, his Lordship directed the Jury to consider, whether it would have made the underwriters regard the *Ganges* as a missing ship, and require an increased premium; or, whether it either would not have excited their curiosity, or could not have led them to any useful information.

[*137]

The plaintiff had a verdict.

† Park Ins. 8th ed. 267.

1807.
Dec. 21.

LECK AND ANOTHER v. MAESTAER.

(1 Camp. 138—139.)

[138]

The proprietor of a dry dock is under a duty towards the owners of ships received in the dock to have a sufficient number of men on the premises to take precautions against danger such as the pressure of an unusually high tide.†

ACTION on the case for negligence.—The defendant is proprietor of a dry dock, on the river Thames; into which a ship of the plaintiff's had been put to be repaired. Whilst she lay here, during a remarkably high tide, the dock-gates were burst open by the water, and she was thereby forced against another vessel, and greatly injured. When the accident happened, although in the day-time, the workmen were all absent, and there was only a watchman left to take care of the shipping in the dock. The plaintiff's witnesses described the gates as having been rotten, and imputed their giving way to this circumstance. They thought, however, that with a proper number of hands, the gates might still have been shored up, so as to bear the pressure of the water.

The *Attorney-General*, for the defendant, said, he could shew, that the gates were in a perfectly sound state, fit to resist any pressure that could be expected or foreseen, and that they had burst open, merely from the uncommon height of the tide, for which the defendant could not be answerable. But,

Lord ELLENBOROUGH held, that it was the duty of the defendant to have had a sufficient number of men in the dock, to take measures of precaution, when the danger was approaching, and that he was clearly answerable for the effects of this deficiency.

[139]

The plaintiff therefore had a verdict.†

† The duties and liabilities of a dock company will be found fully considered in the *Mersey Dock Cases* (H. L. 1865) L. R. 1 H. L. 93, and (in the Exchequer and Exchequer Chamber) 3 H. & N. 164, and 7 H. & N. 329.—R. C.

† The bailment in this case comes under the second subdivision of Sir William Jones's 3rd class, or *locatio operis faciendi*; where work and labour, or care and pains, are to be performed or bestowed on the thing delivered, for a pecuniary recom-

K. B. (AT NISI PRIUS) HILARY TERM.

DUDLEY *v.* SMITH.

(1 Camp. 167—170.)

1808.
Jan. 27.*At West-
minster.*

[167]

The proprietor of a stage coach is answerable for the negligence of the driver, from the usual place of taking up passengers, not only till the coach arrives at its place of destination, but till the passengers are there safely set down. The driver of a stage coach, before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger; and if he proceeds without giving them this information, the proprietor is liable for any injury they may thereby suffer, which they might have escaped by alighting.

CASE for negligence, against the owner of a stage-coach.—The declaration stated, that the plaintiff, Elizabeth Dudley, became and was an outside passenger on the defendant's coach, to be safely and securely conveyed thereon, from a place called the Red Lion, in the Strand, to Chelsea; and that it was thereupon the duty of the defendant to have so conveyed her; but that he failed to do so; "and on the contrary thereof, defendant afterwards, and whilst plaintiff continued as such outside passenger on the said coach, and before she was set down, or had alighted therefrom, to wit, on the day and year aforesaid, at Chelsea aforesaid, by a certain then servant of the defendant, employed and trusted by him upon that occasion, wrongfully, injuriously, carelessly, negligently, *and improperly, drove the said coach through and under a certain low and narrow gateway there; whereby plaintiff was then and there thrown and knocked down from and off the said coach, &c."

[*168]

pense; and where, as the contract is for the advantage of both the contracting parties, there is required on the part of the bailee ordinary diligence, or that care which every man of common prudence, and capable of governing a family, takes of his own concerns. *Essay on Bailments*, 85, 90, 119. The defendant therefore was not answerable for slight neglect, or the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels,

as if he alone had derived benefit from the bailment; any more than for a loss by inevitable accident, or irresistible force, for which no bailee shall be charged, except by special agreement. But his failing in the daytime to have a competent number of workmen in the dock, shewed a want of that care of the plaintiff's ship, which it might reasonably be expected he would have taken of her, had she been his own property. [See Preface.—F. P.]

DUDLEY
v.
SMITH.

It appeared in evidence, that the plaintiff was carried safely as an outside passenger on the top of the coach, to the Cross Keys at Chelsea, where it stops. When arrived before the gateway of this inn, leading to the stable-yard, the coachman requested her to alight there, as the passage into the yard was very awkward. She said, as the road was dirty, she would rather be driven into the yard. He then advised her to stoop, and drove on. The consequence was, that she was struck violently on the shoulders and back by a low archway in the passage, and received a personal injury, of which she is not likely ever to recover. A surveyor swore, that from an admeasurement he had made, this archway was only 9 feet 9 inches from the ground, and that the top of one of the defendant's coaches, which seemed exactly of the same height with all the others, was 8 feet 9 inches from the ground, allowing an interstice of 12 inches for the body of any person attempting to ride through upon it. The plaintiff's case being closed,—

[*169]

The *Attorney-General* contended, that this evidence would not support an action against the proprietor of the coach, whether blame was, or was not, imputable to the driver. The declaration stated it to be the duty of the defendant to carry the plaintiff safely and securely from the Red Lion in the Strand to Chelsea; *he had done so, and brought her to the spot where the coach was accustomed to stop. Here the journey was completed, and she was desired by the coachman to step down. If after that, she chose to remain on the coach, and to ride into the yard, into which the defendant was not bound by his undertaking to carry her, his responsibility ceased; he was not answerable for the negligence or misconduct of his servant subsequent to the termination of the journey, and the plaintiff's only remedy was against the coachman, if she had any legal cause of complaint.—But, in fact, she had been warned of her danger; she had been told that the passage was very awkward, and if she still persisted to continue on the coach, it was at her own peril.

LORD ELLENBOROUGH:

The defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down. As coach-

owner therefore, he was answerable for the negligent acts of his servant, till the plaintiff was set down at the usual place for passengers alighting at Chelsea. This appears, for the inside passengers at least, to have been the yard. If the coachman had said to her, "the others will be safe in proceeding, but you must go down here, as you cannot remain upon the coach without danger to your life," she could only have blamed her own imprudence for what followed. But he should have given her the materials to judge, if he was to leave her to make her election. He told her the passage was awkward; whereas, according to the evidence, it was impracticable.

DUDLEY
v.
SMITH.

The *Attorney-General* then undertook to prove, that with proper caution the plaintiff might have rode through into the yard upon the coach, without any injury; and two witnesses actually swore that they had done so frequently.

[170]

Lord ELLENBOROUGH left it to the jury to consider, whether the coachman had sufficiently warned the plaintiff of her peril, or whether the passage was more dangerous than she had reason to suppose it to be, from the manner in which she heard it described by him.

The jury found a verdict for the plaintiff, with 100l. damages.†

FALCONER v. HANSON.

(1 Camp, 171—172.)

1808.
Jan. 28.

If a witness examined upon interrogatories, refers to a writing, itself not evidence, as containing a statement of the facts to which he is interrogated, this writing may be read as part of his deposition.

[171]

What is sufficient evidence of a witness being abroad, to let in his examination upon interrogatories as evidence.

THIS was an action of covenant upon a charter-party; in which the parties took issue upon, whether the ship sailed on her voyage with the first fair wind after taking in her cargo.

† Vide *Aston v. Heaven*, 5 B. R. 750 (2 Esp. Cas. 533).

FALCONER
 v.
 HANSON.

By rule of Court, several of the witnesses had been examined upon interrogatories. Amongst these was the captain, whose deposition stated that the log-book contained a true account of the time when the vessel sailed, the state of the weather, &c.

Garrow, for the plaintiff, accordingly proposed to read several extracts from the log-book, as evidence.

Park, on the other side, objected to this, on the ground, that if the witness had been present, the log-book could only have been used by him to refresh his memory, and could not have been read as evidence, although he had sworn in the box that its contents were true.†—But,

[172] Lord ELLENBOROUGH held, that the parts of the log-book referred to in the deposition might be received in evidence, in the same manner as if they had been copied, and inserted in the deposition itself as coming directly from the deponent.

The deposition of another witness, who had been examined in the same manner, was rejected, for want of sufficient proof of his being out of the country. It was sworn, that he was a sea-faring man, and that in June last he belonged to a vessel lying in the river Thames; but of what nature this vessel was, or whither she was bound, it did not at all appear.

The CHIEF JUSTICE was disposed to receive the deposition upon this evidence of the witness's absence from the kingdom, if it could further be shewn, that any efforts had been recently made to find him; but nothing of this kind being proved, he thought the evidence of the witness being beyond the jurisdiction of the Court, too vague to admit his written deposition.‡

The cause was afterwards referred.

† Peak. Law Ev. 12, 14. It has been held, that the logbook of a man of war is itself evidence, to prove the time of the sailing of a

ship, forming part of a convoy, which the man of war had escorted. *D'Israeli v. Jowett*, 1 Esp. Cas. 427.

‡ *Anonymous*, 2 Salk. 691.

BOND *v.* GIBSON AND JEPHSON.

(1 Camp. 185—186.)

1808.
Feb. 15.

[185]

Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties.

ASSUMPSIT for goods sold and delivered.—It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number of bits to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his co-partner, he immediately pawned them to raise money for his own use.

Gazellee, for the defendant Gibson, contended, that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants.

LORD ELLENBOROUGH:

Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I *will take it that Jephson here meant to cheat his co-partner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that this individual acted for the partnership.

[*186]

Verdict for the plaintiff.†

† Vide *Willet v. Chambers*, Cowp. 2nd ed. 175, 180.
118; Watson's Law of Partnership,

1808.
Feb. 18.

WOODMAN *v.* CHAPMAN, WIDOW.

(1 Camp. 189.)

[189]

A debt contracted by the wife before marriage survives (at common law) against her upon the death of her husband.

IN this case it appeared, that the debt for which the action was brought had been contracted by the defendant before her intermarriage with her late husband.—The point was taken, therefore, that his representatives alone were liable for it.—But

LORD ELLENBOROUGH held that this debt, contracted by the wife before marriage, survived against her upon her husband's death; although during the coverture, in an action to recover it, he must have been joined for conformity.

The cause was afterwards referred.†

[*190]

† As a counterbalance to this liability, choses in action belonging to the wife *dum sola*, and not reduced into possession by the husband, do not go to his representatives upon his death; and causes *of action survive to the wife which accrued during the coverture in respect of her real estate, or for any personal wrongs done her. Com. Dig. tit. Baron & Feme (2 A.). Bac. Abr. tit. Baron & Feme (C) 3. Upon the same principle, if the debts of the wife *dum sola*, are not recovered

against the husband and wife in the lifetime of the wife, the husband cannot be charged for them either at law or in equity, after her death, should he have had ever so large a fortune with her. But if she leaves behind her any choses in action, these, although they belong to him as her representative, are to be considered as assets, in respect of which he will be chargeable for her debts. F. N. B. 121. *Heard v. Stamford*, 3 P. Wms. 409. Cas. temp. Talb. 173 S. C.

MORRIS, ESQ. v. BURDETT, BART.†

(1 Camp. 218—227.)

1808.
Feb. 23.

[218]

A candidate at an election of members of Parliament is not liable for any part of the expenses of the election, except by positive statute or his own undertaking, notwithstanding a long usage for the expenses being rateably defrayed by the candidates.

If a candidate to represent a city or a borough in Parliament makes use of hustings, erected by the returning officer, for the accommodation of himself or his agents, a promise on his part will be inferred to contribute to the expense of erecting them.

ASSUMPSIT for work, and labour, and materials found; with the common money counts.

The action was brought by the High Bailiff of Westminster against the defendant, who was returned to parliament as one of the representatives for that city at the last general election, to recover from him a proportion of the expenses then incurred by the plaintiff as returning officer.—The following were the principal items in the particular of the plaintiff's demand, to which the defendant was required to contribute:

	£	s.	d.
Six under-bailiffs to attend proclamation of election	6	6	0
High Constable's attendance	1	11	6
Cryer, for proclamation and horse-hire	5	15	6
24 poll-clerks, at 21s. and 5s. each	468	0	0
24 staff-men at 7s. 6d. and 2s. 6d. each	180	0	0
Table for High-Bailiff, Deputy, &c.	120	0	0
2 commissioners for administering the oaths of allegiance, &c. at 21s. and 5s.	39	0	0
Bill for erecting hustings and surveyor's fee for valuing same	553	10	10
Bond of indemnity to church-wardens of St. Paul, Covent-Garden, and incidental damages	40	0	0
Printer's bill for tickets, &c.	14	3	6
The sum total amounted to	£1507	0	0

[219]

† See a case between same parties on a subsequent election (1813) 2 M. & S. 212. And see Reform Act of 1832, 2 & 3 W. IV. c. 45, s. 71; *Davies v. Lord Kensington* (1874) L. R. 9 C. P. 720.—B. C.

MORRIS
v.
BURDETT,
BART.

The election took place in May, 1807, when five candidates were proposed, viz. Right Hon. Lord Cochrane, the Right Hon. R. B. Sheridan, Sir Francis Burdett, Bart. the defendant, John Elliott, Esq. and James Paul, Esq. This last gentleman however withdrew early in the contest, and paid 200*l.* as his share of the expenses then incurred. The defendant was afterwards called upon for the sum of 326*l.* 15*s.* being the fourth part of the 1,307*l.* which remained to be divided between himself and the other three candidates; but refused to pay any part of it, on the principle that a Member of Parliament should be elected free from all expense.

[220] It was admitted or proved, in the course of the trial, that the charges were exactly such as had been made on similar occasions, as far back as could be remembered; that the sums mentioned in the particular had been disbursed by the plaintiff; that the defendant was confined to his bed by illness during the whole election; that before the poll began, a Mr. Percy, on the part of a committee of electors in the interest of the defendant, informed the plaintiff that no part of the expense of the election would be defrayed by Sir Francis or his friends,[†] but required him to supply them with tickets for the hustings; that the inspectors and poll-clerks, acting in the interest of the defendant, had the same accommodation and privileges during the election as those of the other candidates; that a requisition was made by Lord Cochrane for administering the prescribed oaths to Roman Catholics, upon which commissioners were appointed for that purpose; that the defendant upon *the meeting of Parliament took his seat in the House of Commons; and that the office of High Bailiff was purchased for a considerable sum of money by the plaintiff.

† Mr. Percy at the same time delivered to the plaintiff, as his authority for this application, a minute of a resolution of the committee, of which the following is a copy:

At a meeting of the committee of electors of Westminster, friends of Sir Francis Burdett, Bart. held at the Britannia Coffee-House, Covent-Garden, on Wednesday the 5th of May,

1807.

Mr. Francis Place in the Chair.
Resolved,

That Mr. Percy do wait upon the high bailiff, to request the necessary tickets for the hustings, and that Mr. Percy do likewise officially appoint the inspectors and check-clerks.

FRANCIS PLACE.

The *Attorney-General* contended, that under these circumstances the plaintiff was entitled to recover to the full extent of his demand. From the antiquity and notoriety of the different charges a promise might be inferred on the part of every candidate to submit to them. The present defendant might not have personally interfered pending the election; but by subsequently taking his seat in the House of Commons, he had acceded to the character of a candidate, and adopted the acts of his committee. —The items in themselves could not be considered as unreasonable. Without the attendance of the staff-men and constables it was impossible that the peace of the metropolis should be preserved during the tumult of the election; and the whole of the clerks charged for were indispensably necessary to the taking of the poll. The hustings, if not equally necessary, at least contributed greatly to the convenience of the candidates as well as of the electors, and tickets of admission to them had been expressly required by the defendant's agent,—which likewise rendered him liable for a share of the printer's bill. The bond of indemnity to the church-wardens of the parish of St. Paul, Covent-Garden, had always been required by them, before they would grant permission to erect the hustings in the usual place, near the church. As to the charge for commissioners to administer oaths to Catholics, *there could be no sort of doubt; it being enacted by stat. 34 Geo. III. c. 73, that such commissioners shall be provided, upon the requisition of any one of the candidates, and that the expense shall be defrayed by all the candidates in equal proportions.

MORRIS
v.
BURDETT,
BART.

[*222]

Garrow on the other side maintained that there had been no assent on the part of the defendant, either express or implied, to be answerable for any part of these expenses. Particular items he did not object to, denying his liability altogether. * * *

LORD ELLENBOROUGH :

[223]

A candidate at an election for members of Parliament is liable to no expense except such as the statute law casts upon him, or he takes upon himself by his express or implied consent. A great number of these items may therefore be entirely laid out

MORRIS
v.
BURDETT,
BART.

of consideration, as arising from acts which the plaintiff was bound to do by reason of his office, or as of such a nature that no promise to contribute to them can possibly be inferred.—To proclaim the election is a duty which the law imposes upon the High Bailiff, and there is the less pretence for charging the candidates with it, as they had not then been nominated. It does not seem necessary that he should have been attended on the occasion with six under-bailiffs, the crier on horse-back, &c. but if it was, he must consider the consequent expense a burthen he took upon himself along with his office; which must be a lucrative one, from the terms on which it was purchased.—So the law requires him to do whatever is necessary to making the return; and if the election cannot take place without the attendance of so many staff-men and poll-clerks, he alone must retain and pay them. The charge for the High Bailiff's table, however long established, cannot be sustained, and is without any colour of justice.—For a share of the expense incurred in administering the oaths to the Roman Catholic electors the defendant appears to be liable, if he shall be considered as having acceded to the character of a candidate. But the statute, while it casts this burthen upon the candidates, regulates the amount of the compensation to be given to the commissioners, and enacts that the returning officer shall provide commissioners at a sum *not exceeding one guinea per day for administering such oaths. Therefore this item must be reduced to that amount.—The defendant's liability as to the hustings, will depend upon whether he has in any manner undertaken to defray a part of the expense of erecting them. In county elections the sheriff is required to erect hustings, to be paid for by the candidates; but this Act does not extend to cities or boroughs, and the returning officer here might have taken the poll either in the Guildhall, Westminster, or in the open air. Still, however, the candidates may make themselves liable for the expense of the hustings; and if Percy had authority from the defendant to demand tickets, I think the defendant is liable in this instance. If Percy had no such authority, then it must be considered whether a promise may be inferred from the defendant's silence upon the subject, and his agents having constantly made use of the hustings. If

[*224]

it is to be taken that Percy had no authority from the defendant to bespeak the tickets, then he cannot be looked upon as the defendant's agent to warn the plaintiff that no part of the expense of the election would be defrayed by him; the protest was idle, and no notice of the kind supposed was ever given. In that case the circumstance of the defendant's agents having used the hustings seems entitled to some weight; for though a candidate at such an election may remain without-side the hustings, and require the peace to be kept; yet if he uses the hustings for the accommodation of himself or his agents, he must be presumed to promise to pay a part of the expense of erecting them; he must take the burthen with the benefit. With the bond of indemnity *I think the defendant can have nothing to do; as there was no occasion to hold the election where there was danger to the church of St. Paul, Covent Garden: but if he acceded to the character of a candidate, then he is liable for his share of the printer's bill, which is stated to be for printing tickets of admission to the hustings, and the forms of certificates required by the Act of Parliament concerning the administering of the oaths to Roman Catholics.—Whether the defendant had taken upon himself the character of a candidate, and adopted the acts of his committee, his lordship left as a question of fact with the jury.

MORRIS
v.
BURDETT,
BART.

[*225]

Verdict for the plaintiff, with 117l. 8s. 2d. damages, being one-fifth of the charges for hustings, and special commissioners, and a small portion of the printer's bill.

In the following Term *Clifford* moved for a rule to shew cause why this verdict should not be set aside; contending that a candidate at an election of members of Parliament cannot be liable for any part of the expenses except by positive statute; that an officer charged with the execution of a writ cannot legally take any thing for executing it; that even an express promise to a returning officer to pay him part of the expenses of the election would be void; that all those things, in respect of which the charge was here made upon the defendant, had been done by the plaintiff in the execution of his duty; that it was for him alone

MORRIS
v.
BURDETT,
BART.
[*226]

to fix the place of election, at which the candidates and electors were bound to attend; that if he chose to erect booths or hustings for conducting the *election with more convenience, he could not throw the expense upon the candidates; and that the act rendering the candidates at county elections liable for the hustings when erected at their request, shewed there could be no such liability at common law.

The COURT, however, (after hearing the whole of Chief Justice's charge to the jury read from the note of a shorthand writer), were of opinion that his Lordship's direction was right; that the items for which the defendant was charged had nothing to do with the execution of the writ for the election of members of Parliament; that the hustings were to be considered as any other building in the neighbourhood of the place of election of which the defendant had availed himself; that if his agents had demanded tickets for the hustings and he had sanctioned their acts, (points left to the jury,) he must take a part of the burthen along with the convenience; and that the whole case had been properly put upon the ground of the defendant's adopting the character of a candidate, and thereby assenting to what had been done by his committee.

Clifford therefore took nothing by his motion.†

† Vide *Stotesbury v. Smith*, 2 Burr. 924, Black. Rep. 204 S. C.; *Barkly v. Kempstow*, Cro. Eliz. 123; *Budge v. Cage*, Cro. Jac. 103; *Jermyn v. Lucas*, Trials p. Pais, 181.

N. The usage in Westminster has hitherto been for the High Bailiff to procure an express promise from the candidates, by calling upon them before their nomination to sign an agreement in the following form:—

To A. B. Esq. High Bailiff of the City and Liberty of Westminster.

We, whose names are hereunto subscribed, candidates to serve in Parliament at the election for the

city and liberty of Westminster, do hereby authorise and desire the said High Bailiff, or his Deputy, to find and provide sufficient clerks, porters, &c. and also to find and provide a table for the High Bailiff, his Deputy, and Officers, (the charge of which not to exceed ten guineas per day,) and to take every necessary step for the conducting and ordering the said election, until two candidates shall be returned by a majority of electors of the said city and liberty; and we do hereby promise and agree to pay to the said High Bailiff, or his Deputy, all expenses of the said election. Witness our hands, &c.

WILTSHIRE v. SIMS.

(1 Camp. 258—259.)

1808.
March 1.

[258]

An agent employed generally to do any act, is authorised to do it only in the usual way of business. Therefore as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bona fide*, and with a view to the benefit of his principal.

Action for not transferring stock.

The only witness was Watkins, the broker in this transaction, who stated that the defendant gave him orders to sell out 500*l*. of the stock of the trustees of the Commercial Road; that on the 27th of August he agreed to sell it to the plaintiff; that as the transfer could not be made till the expiration of a fortnight, when there was to be a meeting of the trustees, the plaintiff paid him for the stock by a promissory note at 14 days; that in taking the note he acted with a view to his employer's advantage, thinking the stock might fall before the transfer could be made; that he paid in the note to his bankers, where it was attached for a debt of his own; and that at the end of the fortnight the defendant refused to make the transfer, as he had received no part of the purchase money.

It was contended for the plaintiff, that the sale of the stock on the 27th of August was binding on the *defendant. Watkins was his authorised agent, and had acted *bona fide* for his benefit. He must be supposed to have empowered his agent to sell the stock in the manner most for his interest, and the loss ought to fall upon him, not upon the plaintiff, who had paid for the stock, under the natural impression that Watkins had authority to sell it immediately, though a short time was to intervene before the stock could be transferred in the books of the trustees.

[*259]

LORD ELLENBOROUGH:

When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at 14 days? Has a broker in common cases power to give

WILTSHIRE
v.
SIMS.

credit for the price of the stock which he agrees to sell? The broker here sold the stock in an unusual manner; and unless he was expressly authorised to do so, his principal is not bound by his acts.†

Plaintiff nonsuited.

1808.
March 2.

[260]

REX v. LLOYD.†

(1 Camp. 260—262.)

If a passage leading from one part to another of a public street (though by a very circuitous route), made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain across it, and without any person passing through it meeting with interruption, it is to be considered as dedicated to the public, and it becomes a highway, to obstruct which is an indictable offence.

THIS was an indictment for obstructing a highway.

It appeared that the place in question is a narrow passage lying on the north side of Snow-Hill, called Cock-court; and being of an oblong shape, leads from one part of this street to another, without having any outlet elsewhere. The houses all the way round had once belonged to the same individual; and the defendant, having purchased those at the top of the court, built a wall across there, intercepting all communication between the two sides, unless by way of Snow-Hill. Till then, the pas-

† Per CHAMBER, J.: "There is no doubt of the authority of a factor to sell upon credit, though not particularly authorised by the terms of his commission so to do." *Houghton v. Matthews*, 7 R. R. 815 (3 Bos. & P. 489). *Scott v. Surman*, Willes 407. S. P. But this doctrine is founded on "the constant and daily experience, that factors do sell upon credit without any special authority," and therefore confirms the general maxim, that when an agent is employed to do any act, he shall be supposed to have an authority to do it in the manner in which it is usually done. Goods are almost always, stock is scarcely ever, sold upon credit, and hence the distinction between the powers of the

factor and the stock broker. An agent can in no case bind his principal by any act beyond the scope of his authority. *Fenn v. Harrison*, 3 T. R. 757.

† Followed by BACON, V. C., in *Healey v. Corporation of Batley* (1875) L. R. 19 Eq. 375, 388, 44 L. J. Ch. 642; and by MALINS, V. C., in *Fernon v. Vestry of St. James's, Westminster* (1880) 16 Ch. D. 449, 455, 50 L. J. Ch. 81, 44 L. T. 229. The judgment of MALINS, V. C., was affirmed by the Court of Appeal; and (notwithstanding a statement of the reporter that the Court of Appeal gives no opinion on the point), it is to be inferred that they were satisfied with the judgment of the V. C. upon it.—R. C.

sage had been open, as far back as could be remembered ; and though it could in general be of no use to those walking up or down Snow-Hill, being a most circuitous route which no one would willingly take, yet it was convenient for the public, when the street was blocked up by a crowd. The *passage had been long lighted by the city of London, and there had never been any chain across it, or any mark to denote its being private property.

REX
v.
LLOYD.

[*261]

LORD ELLENBOROUGH :

I take it for granted the defendant means to shew habitual interruptions offered to persons attempting to pass through.

Marryat, for the defendant, contended that evidence of this kind was not necessary, and that this court could not be considered a highway, to obstruct which was a public crime. It had been made originally for the convenience of those occupying the houses on both sides, and whether or not individuals might bring an action for the obstruction, the public had no right to complain. It was of no use whatever to persons passing and re-passing through Snow-Hill ; and if it was to be considered a public highway, because people took refuge in it from a crowd, the same law might be extended to shops and private houses. The circumstance of its being lighted by the city was of no consequence ; as the city, to prevent indecorums, lighted many private courts, through which there was no thoroughfare, and in which the public could have no interest.

LORD ELLENBOROUGH :

I think that, if places are lighted by public bodies, this is strong evidence of the public having a right of way over them ; and to say that this right cannot exist because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where (as in Queen-*square) there is no thoroughfare.† If the owner of the soil throws open a pas-

[*262]

† In pleading a public highway, it is not necessary to state any termini. 1 H. Bl. 351.†

† *Sc. Rowse v. Bardie* ; see also *Fulcher* (1858), 1 E. & E. 111 ; *Bullen Petrie v. Nuttall*, 11 Ex. 569 ; *Pipe v. and Leake*, 3rd edit. p. 816.—R. C.

REX
v.
LLOYD.

sage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it, after being allowed to use it so long without any interruption.

The defendant was found guilty.†

† But the erection of a bar, although it may have been knocked down, rebuts the prescription of a dedication to the public.

ROBERTS v. KARR.

Kingston Lent Assizes, 1808.

(1 Camp. 262 n.)

Cor.
HEATH, J.

To trespass *quare clausum fregit*, the defendant justified under a public right of way. It appeared in evidence, that some years ago a street was made over the *locus in quo*, which had been before an enclosed field; that soon after the houses were finished a bar was placed across the street, to prevent carriages from passing through it; but that the bar was soon knocked down; since which time it had been used as a thoroughfare. On the part of the defendant, it was contended that this amounted to a dedication to the public, at least as a footpath. But HEATH, J., observed, that the putting up of the bar rebutted the presumption of a dedication to the public. Such a dedication must be made openly and with a deliberate purpose. *Nor could there be a partial dedication to the public, although there might be a grant of a footway only. This street, he thought, was to be considered merely as a way for the use of the tenants inhabiting the houses

on each side of it. There was a verdict for the plaintiff on this issue.

LETHEBRIDGE v. WINTER.

Somerset Spring Assizes, 1808.

(1 Camp. 263 n.)

Trespass for entering plaintiff's close, and pulling down a gate. Plea, that there was a public footway over the *locus in quo*, and because the gate was wrongfully erected across the same, the defendant pulled it down. It appeared in evidence that the gate in question had been recently been put up in a place where a similar gate had formerly stood, but where for the last twelve years there had been none. It was thereupon contended for the defendant, that from suffering the gate to be down so long and permitting the public to use the way without obstruction for so many years, the plaintiff and those under whom he claimed must be considered as having completely dedicated the way to the public, and that the gate could not be replaced. The plaintiff, however, under the direction of *Marshall*, Serjt., had a verdict; which the Court of K. B. the following Term refused a rule *nisi* to set aside.

Vide etiam Lade v. Shepherd, *Str.* 1004; *Goodtitle ex. d. Chester v. Alker*, 1 Burr. 133.

JARRATT v. WARD.

(1 Camp. 263—266.)

1808.
March 4.

Leave granted in a policy of insurance on a fishing voyage to see prizes into port, does not authorize the ship to remain in port till a prize receives necessary repairs, which she could not otherwise have had; and at most extends to seeing the prize moored safely, and giving the necessary orders for her final destination.†

[263]

ASSUMPSIT on a policy of insurance on the ship *Lucia*, from London to the southern whale fishery and back again, with leave to carry letters of marque, and to cruise for, chase, capture, man, and *see into port, any ship or ships of the enemies of our lord the King.

[*264]

The chief question was, whether the policy had been vacated by a deviation. The *Lucia* sailed in March, 1805, and in July arrived at Rio de Janeiro. There the master entered into an agreement with another whaler, to keep together for the rest of the voyage, and to share between them what prizes they should make. They accordingly left Rio de Janeiro in the beginning of August, and immediately after captured a merchant vessel. The prize was very leaky, and for the purpose of repairing her they went to St. Sebastian's. Finding however that the necessary repairs could not be done to her there, they bore away for St. Catharine's. At this place they remained a month, during which time they took out the cargo from the prize, and afterwards reloaded it when she was repaired. They then dispatched her for Europe, and proceeded on their voyage. Without their staying at St. Catharine's and assisting her, she could not have been repaired or rendered fit to carry home her cargo. The *Lucia* was afterwards lost by running ashore on the coast of Peru.

Park, for the plaintiff, contended that the ship insured in accompanying and staying with the prize had not exceeded the liberty granted by the policy. To see prizes into port must mean, to take care of them until they were once in a state of safety; and if the permission authorised the yielding of necessary assistance to prizes at sea, it must extend to granting the

† See on a somewhat similar 2 Taunt. 428, reported 11 R. R.—question, *Hibbert v. Halliday* (1810) R. C.

JARRATT
v.
WARD.
[*265]

same assistance in port, or the other would be nugatory. *Here but for the stay of the *Lucia* at St. Catharine's, the prize never could have been refitted, and might as well have been sunk the day she was captured. The intention of the policy clearly was to cover whatever was necessary for rendering any prizes taken in the course of the voyage available and beneficial to the captors, and it appeared that nothing had been done in the present instance beyond what was requisite for that purpose.

The *Attorney-General* on the other side observed, that the substance of this contract was a fishing voyage, and beyond that nothing could be done without special leave. The utmost extent of the privilege to see prizes into port was, to see them safely moored. But the ship was not to lie by and wait till they were repaired, thus lengthening the voyage and increasing the risk. Although it might be necessary to stay by the prize so long at St. Catharine's there was no liberty in the policy for this purpose, and therefore there had been a deviation, by which the underwriters were discharged.

LORD ELLENBOROUGH :

The scope of the voyage insured was certainly only a commercial adventure. It was formerly considered that in such a case the mere taking of a letter of marque on board, without the consent of the underwriters, vitiated the policy, from the temptation it held out to privateering : † but I believe the *general opinion now is, that a mere irritation of this sort shall not operate as a deviation. Here leave is given to see prizes into port, which would have authorized the ship to accompany prizes to any con-

† So held in *Dennison v. Modigliani*, 5 T. R. 580. But in *Moss v. Byrom*, 3 R. R. 208 (6 T. R. 379), the Court of K. B. decided that letters of marque taken out, without the proper certificate and without any intention of cruising, merely for the purpose of enticing seamen to enter, did not avoid the policy, even though the captain, against his instructions, cruised and took prizes.

And, per LAWRENCE, J., in *Raine v. Bell*, 9 R. R. 539 (9 East, 201), "If an intention to deviate, not carried into effect, will not avoid a policy, still less can a temptation to deviate. If the doing of a thing do not alter the risk of the underwriter, and be not expressly prohibited to be done, I cannot say that it vitiates the policy. as upon the breach of an implied condition."

venient port, consistent with the main adventure. She might have entered the port with them, and seen them safely moored, and perhaps stopped a reasonable time to give directions for their proceeding on their final destination. All this might have ranged under the words of the policy; but in their largest sense they could not justify the ship in waiting till the prize was repaired. If this were allowed, when was the voyage to terminate? On leaving St. Catharine's another prize might have been taken, standing equally in want of repairs; afterwards a third, and so on in an infinite series. This therefore turns out to be a risk, which the defendant did not underwrite.

JARRATT
v.
WARD.

The defendant had a verdict.

M'DOUGALL, GENT. ONE, &C. v. CLARIDGE,
GENT. ONE, &C.
(1 Camp. 267—268).

1808.
March 2.

[267]

A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B. the writer of the letter was likewise interested, cannot be considered a libel, and made the subject of an action for damages.

THIS was an action for a libel on the plaintiff in his profession as a solicitor.—Plea, the general issue.

The libel set out in the declaration was contained in a letter written by the defendant to Messrs. Wright & Co. bankers at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, that the letter was intended as a confidential communication to these gentlemen, and that the defendant was himself interested in the affairs which he supposed to be mismanaged by the plaintiff.—After the case had been opened by the defendant's counsel—

LORD ELLENBOROUGH said, if the letter had been written by the defendant confidentially, and under an impression that its statements were well founded, he was clearly of opinion that the action could not be maintained. It was impossible to say that

M'DOUGALL
 v.
 CLARIDGE.
 [*268]

the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bonâ fide*, with a view to the *interests of himself and the persons whom he addressed ; and if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. His Lordship referred to a case of *Cleaver v. Sarraude*, tried on the northern circuit while he was at the bar ; where, in an action like the present, it appeared that the letter had been written confidentially to the Bishop of Durham, who employed the plaintiff as steward to his estates, to inform him of certain supposed mal-practices on the part of the plaintiff ; upon which the judge who presided declared himself of opinion, that the action was not maintainable, as the defendant had been acting *bonâ fide* ; and the nonsuit which he directed had been acquiesced in, from a conviction entertained by the plaintiff's counsel of its being founded in law.

The *Attorney-General*, for the defendant, said, that his client at the time of writing the letter was certainly impressed with a belief of the truth of the charges it contained, but had since seen reason to believe they were groundless.†

He therefore consented to withdraw a juror.

[269]

† In like manner, verbal communications, when confidential, are not actionable ; and if A. is surety for B. to C., A. if acting *bonâ fide*, may lawfully state to C. in an unreserved manner, his opinion of B.'s conduct and character, whatever the charges may be which he thus imputes to him.

DUNMAN v. BIGG.

London Sittings after T. T.

48 Geo. III.

(1 Camp. 269.)

Action for words. Plea not guilty.
 —The plaintiff was a dealer in beer,
 buying it of brewers and selling it

to publicans. Wishing to open an account with the defendant, a brewer, one Leigh became his surety for the price of such quantities of beer as should from time to time be supplied to him, the defendant promising to inform Leigh of any default in his payments made by the plaintiff. After the parties had dealt together for some time, the defendant went to Leigh, and spoke to him in very opprobrious terms of the plaintiff ; saying that he wished to cheat him ; that he had sent back as unmerchandise, beer which he himself had adulterated ; that he was a rogue and a rascal, &c. At this period there was a sum of money due from

SHEPHERD v. CHEWTER.†

(1 Camp. 274—275.)

1808.
April 25.

[274]

An adjustment is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his attention was not then drawn to circumstances he afterwards learns, by which the underwriters were discharged.

ASSUMPSIT on a policy of insurance on goods on board the *Astrea*, at and from Liverpool to Trieste or Venice, with or without letters of marque. The loss was laid to be by capture.

The plaintiff gave in evidence, an adjustment on the policy signed by the defendant; and proved that previously to its being

the plaintiff to the defendant, in respect of the beer for which Leigh had given a guarantee.

LORD ELLENBOROUGH:

I am inclined to think that this was a privileged communication. Had the defendant gone to any other man and uttered these words of the plaintiff, they certainly would have been actionable. But Leigh, to whom they were addressed, was guarantee for the plaintiff; and the defendant had promised to acquaint him when any arrears were due. He therefore had a right to state to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still if he really believed them at the time to be true, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under colour and pretence of a confidential communication, destroy the plaintiff's character and injure his credit: but it must have the most dangerous effects, if the communications of business are to be beset with actions

of slander. In this case the defendant seems to have been betrayed by passion into some unwarrantable expressions. I will therefore not nonsuit the plaintiff; and it will be for the jury to say, whether these expressions were used with a malicious intention of degrading *the plaintiff, or, with good faith, to communicate facts to the surety which he was interested to know.

[*270]

The parties agreed to withdraw a juror.

So an action will not lie at the suit of a servant against his late master, for words spoken, or a letter written by him, in giving a character of the servant, unless the imputation complained of was not only false, but malicious. *Weatherstone v. Hawkins*, 1 T. R. 110; *Edmonson v. Stephenson*, Bull. N. P. 8. However, in such a case malice may be inferred, from the master officially stating trivial instances of the servant's misconduct, in order to prevent him from getting a second character from a former master, and then himself giving him a bad

† See cases collected in 1 Maude & Pollock, 4th ed., p. 549.

SHEPHERD
v.
CHEWTER. signed, an account had been posted up at Lloyd's Coffee-house, which the defendant must have seen, stating that the ship on her way out had chased every thing she saw, and had been at last captured in the gut of Gibraltar, through the cowardice and mismanagement of the master. The defendant when he signed the adjustment said, it was not likely the ship should have been lost by cowardice, when the captain was killed in the engagement.

On the part of the defendant it was proved, that the ship from the time of her sailing from Liverpool had been in the constant habit of cruising for prizes; and therefore it was contended, on the authority of *Lawrence v. Sydebotham*, 6 East, 45,† and *Parr v. Anderson*, 6 East, 202,‡ that she had been guilty of a deviation which discharged the underwriters.

[*275] *Park*, for the plaintiff, insisted that the only defence which could now be set up was, that some fraudulent *concealment had been practised upon the defendant when he signed the adjustment; but the notice mentioning that the ship had chased every thing, sufficiently informed him of the supposed deviation,

character, the truth of which he is not able to prove. *Rogers v. Clifton*, 3 Bos. & P. 587. It is the subject neither of a criminal prosecution, nor of a civil action, to publish a true account of the proceedings of courts of justice, or of the houses of parliament, however injurious such publication may be to the character of an individual. *Curry v. Walter*, 4 R. R. 717 (1 Bos. & P. 525); *Rex v. Wright*, 4 R. R. 649 (8 T. R. 293, 298). Nor is an advertisement in a newspaper, though injurious to the character of a person mentioned in it, to be considered libellous, if it is inserted *bond fide*, as with a view of investigating a fact, in which the party making it is interested. *De-laney v. Jones*, 4 Esp. N. P. Cas. 191. And it is decided that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus

where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G. being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth, he never was so plagued, and was himself actually present at that discourse—the words being delivered only as matter of history, and not with any intention to slander, it was adjudged for the defendant. Cro. Jac. 91. It seems now settled that in these cases the requisite evidence in bar of the action may be given under the general issue of not guilty. 1 Williams's Saund. 131 (1). [This note by the reporter is reprinted according to our usual practice. As a statement of the law it is now, to say the least, inadequate.—F. P.]

† 8 R. R. 385.

‡ 8 R. R. 461.

and the adjustment subsequently signed was therefore conclusive against him.

SHEPHERD
v.
CHEWTER.

LORD ELLENBOROUGH said the adjustment was *prima facie* evidence against the defendant; but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case; unless they were all blazoned to him as they really existed. Therefore if it should be thought that the defendant, by reading the notice stuck up at Lloyd's, had his attention drawn only to the manner in which the ship was captured, and was not roused to the previous deviation with which he afterwards became acquainted, his liability to the assured would be discharged notwithstanding the adjustment. His remark when he signed the adjustment seems to shew, that he had then only considered the conduct of the master at the moment of the capture; and the expression of the ship having chased every thing did not of necessity imply a deviation, since from carrying a letter of marque she might be considered as at liberty to chase, so that she continued in the direct line of the voyage.

Verdict for the defendant.†

† Vide *Herbert v. Champion* (p. 657, ante, 1 Camp. 134), in which I understood LORD ELLENBOROUGH, Ch. J., to hold, that the underwriter at any time before paying the loss may take advantage of whatever grounds of defence his case offers, although he was actually aware of them when he signed an adjustment on the policy. In the present case it was not essential to consider that point, the defendant when he signed the adjustment having evidently been ignorant of the cruising. But even had he then been fully acquainted with all the circumstances of the voyage, I may be allowed to say, that I do not perceive how the adjustment could have concluded him. From the moment of the deviation the policy was vitiated, and the defendant was discharged from all the responsibility he had incurred by

underwriting it. The first contract being at an end, he may be supposed to have entered into a fresh one by putting his initials to the adjustment; but this promise is clearly without consideration, as he was no more liable upon the policy than an indifferent person who never saw it. *Ex nudo pacto non oritur actio*. The reason for which adjustments have been introduced into the business of maritime insurance, I believe is, that upon the underwriter signing an adjustment, time is given him by the assured to pay the money; but it has been long settled in our courts of justice, that forbearance of suit, where originally there was not any cause of action, is not a consideration to support an assumpsit. *Tooley v. Windham*, Cro. Eliz. 206; *Barber v. Fox*, 2 Saund. 136; *Lloyd v. Lee*, Stra. 94. Although an adjustment

[276]

1808.
April 26.

SMITH AND ANOTHER v. GOSS.

(1 Camp. 282—284.)

[282]

If A. sells goods to B. and according to B.'s directions sends them to C. a wharfinger, to be by him forwarded to B.; while they are in C.'s hands they may be stopped *in transitu* by A.† The right of a consignor to stop goods *in transitu* is not divested by the goods, while in their transit, being attached by process out of the Court of the Mayor of London at the suit of a creditor of the consignee.

TROVER to recover the value of certain packages of hardware.

[*283]

On the 18th of July, 1807, Scaife, a merchant at Newcastle, wrote a letter to the plaintiffs, who are manufacturers at Birmingham, ordering the articles in question, and directing them to be forwarded to him at Newcastle, either by way of London or Gainsborough, as the plaintiff might think they would reach him the soonest. The letter concluded by saying, "If they are sent to London, address them to the care of J. W. Goss (the defendant), Bull Wharf, with directions to *send them by the first vessel for Newcastle." On the 9th of August the plaintiffs accordingly sent the goods to the defendant to be by him forwarded to Scaife, and they were delivered to him on the 17th, 19th, and 22nd of that month. On the 24th of the same month the plaintiffs received a letter from Scaife, stating that he had become insolvent, and that he declined to accept goods, which he found he should be unable to pay for. They im-

may be considered a mercantile instrument, which, like a bill of exchange, *prima facie* imports consideration, it is not easy to imagine how, upon principles of law, the defendant should be debarred from shewing, that in fact it was entirely without consideration; or how greater efficacy can be given to it, than to transfer the burthen of proof from the assured to the underwriter. When money has been actually paid, with a full knowledge of all the circumstances of the case, the convenience of mankind requires *that the party paying it should be estopped from contesting his liability; but the dictates both of law and public policy

[*277]

seem to forbid that the real merits of the question should be shut out by the mere gratuitous promise or acknowledgment of either of the parties. *Rann v. Hughes*, 7 T. R. 350 n.; 3 Bos. & P. 249 (a); *Plowd.* 305, 308; *Marriot v. Hampton*, 4 R. R. 439 (7 T. R. 269); *Bilbie v. Lumley*, 6 R. R. 479 (2 East, 469); *Fisher v. Samuda*, 1 Camp. 190.

† Recent applications of the principle will be found in *Bethell v. Clarke* (1887) 19 Q. B. D. 553, and (1888) 20 Q. B. D. 615, 57 L. J. Q. B. 302, 59 L. T. 808; and *Lyons v. Hoffnung* (J. C. on appeal from N. S. Wales, 1890), 15 App. Cas. 391, 59 L. J. P. C. 79, 63 L. T. 293.—R. C.

SMITH
and Another
v.
GOSS.

mediately wrote to the defendant to stop the goods on their account. The defendant in answer informed them that the goods were attached in his hands by process out of the Mayor's Court of London, at the suit of a creditor of Scaife's, and therefore he could not deliver them to the plaintiffs. In fact this process of attachment was served upon the defendant on the 18th of August, when a part only of the goods had arrived; and as he refused to allow the plaintiffs to enter an appearance, and defend the attachment in his name (which they had offered to do) interlocutory judgment was signed against him as garnishee on the 10th of October, and final judgment was entered up on the 11th of December.

It was contended that, under these circumstances, an action could not be supported at the suit of the consignors of the goods, as they either absolutely vested in the assignees of Scaife, or at any rate the right to stop them *in transitu* was superseded by the attachment in the Mayor's Court. But

Lord ELLENBOROUGH held the plaintiffs entitled to recover; as the goods having been sent to the *defendant for the purpose of being forwarded to Newcastle, were merely at a stage upon their transit, and could not be considered as having reached their final destination when at the wharfinger's in London.—He also held that the right of the vendors to stop *in transitu* could not be defeated by the process out of the Mayor's Court at the suit of the attaching creditor, who could have no greater right in the goods than Scaife himself. The vendor's power of intercepting the goods was the elder and preferable lien, and not superseded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customer's goods for his general balance, which had been decided against the carrier.

[*284]

The plaintiffs therefore had a verdict.†

† Vide *Dixon v. Baldwin*, 7 R. R. 681 (5 East, 175); *Mills v. Ball*, 5 R. R. 653 (2 Bos. & P. 457); *Hodgson v. Loy*, 4 R. R. 483 (7 T. R. 440);

Oppenheim v. Russell, 6 R. R. 604 (3 Bos. & P. 42); *Graff v. Greffulhe*, ante, p. 640 (1 Camp. 89).

C. P. (AT NISI PRIUS) HILARY TERM.

ANSCOMB *v.* SHORE.

(1 Camp. 285—291.)

1808.

Feb. 16.

At Westminster.

[285]

An action on the case will not lie for detaining cattle distrained and impounded, where a tender of amends was not made till after the impounding. And *comme semble* such an action could not be supported even if the tender of amends had been made before the impounding; as the proper mode to try the validity of a distress is by action of replevin or trespass.

THIS was a special action on the case for detaining the plaintiff's cattle in the pound, after a tender of amends; and for not repairing a fence.

The first count of the declaration, after stating that the defendant had distrained the plaintiff's cattle damage feasant in a close of the defendant, went on to aver, that the plaintiff afterwards, and whilst the defendant was in possession of one of the said cattle, under such distress as aforesaid, to wit, on &c. at &c. tendered and offered to the defendant, in satisfaction and discharge of the said damage and of the costs and charges of the said distress, a certain sum of money, to wit the sum of 10s. the same being then and there a sufficient sum to satisfy and discharge the damage aforesaid, together with all the costs and charges of the said distress; and the plaintiff then and there requested the defendant to redeliver and restore the said cattle to the plaintiff; and although the defendant then and there could and might and ought to have accepted *and received the said sum of money from the plaintiff, in discharge of such damage, costs and charges, and to have re-delivered and restored the said cattle to the plaintiff; yet the defendant contriving to harass, oppress and aggrieve the plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any other time, accept or receive the said sum of money from the plaintiff in satisfaction and discharge of the said damage, and of the costs and charges of the said distress; but kept and detained the said cow, and refused to restore or redeliver the same, until the plaintiff, in order to obtain and regain possession of his said cow, was forced

[*286]

and obliged to pay to the defendant, a greater and unreasonable sum, to wit the sum of 5*l.* 5*s.* for the supposed damage alleged to have been done by the said cattle, as last aforesaid, and by means of the said detention, &c. the said cattle became and were greatly damaged, &c.

ANSCOMB
v.
SHORE.

Best, Serjeant, having opened the case, and urged that the sum tendered exceeded the amount of the damage actually done; that it was the defendant's duty to have accepted it by way of amends; that although the law gave the summary remedy of distress to the party grieved, it was only for the purpose of compelling satisfaction; that the detention of the cattle after an offer of this was therefore tortious; and that in this action for the tort the plaintiff would be entitled, at any rate, to recover back the sum of five guineas which he had been illegally forced *to pay before he could procure the restoration of his cattle;—

[*287]

Sir JAMES MANSFIELD, Ch. J. asked if there was any precedent for such an action. It appeared to him that, in cases of this sort, the law had pointed out the specific remedy of replevin, which the party grieved was bound to pursue. The plaintiff here complained of his cattle being detained from him, and being obliged to pay a sum of money to redeem them; whereas by suing out a replevin he might have got them back into his custody almost immediately after they were impounded. But it would be a dangerous innovation, it would be introducing a new process into the law, to try the legality of distresses in an action such as this. He believed, indeed, that in a case in *Cowper* this very point had been decided.†

It was then observed, on the part of the plaintiff, that he

† *Lindon v. Hooper*, *Cowp.* 414, in which his Lordship, then practising in the Court of K. B. was counsel for the defendant, and in which it was held that an action for money had and received, does not lie to recover back money paid for the release of cattle taken damage

feasant, though the distress were wrongful; the proper remedy being trespass or replevin, and assumpsit being considered an unjustifiable attempt to deprive the defendant of the advantages which in those actions he would derive from the rules of special pleading.

ANSCOMB
v.
SHORE.

[*288]

could not have maintained replevin, as the *tender of amends had not been made till after the cattle were impounded.

Sir JAMES MANSFIELD :

If so, there is an end of this question. After the cattle were impounded, every young man who has read "Coke-Littleton" knows, the tender came too late. They were then in the custody of the law, and there could be no tort committed by the defendant in detaining them.

The plaintiff's counsel argued, that though the tender came too late to render the taking illegal, or to have supported an action of replevin, still the defendant was bound to accept it when it was made, and to have restored the cattle, which continued under his control, and which he had, in fact, restored after extorting a sum of money from the plaintiff. On any other supposition, the plaintiff was entirely remediless, whatever oppression had been practised upon him. He could not maintain replevin, having no sufficient plea in bar to the defendant's avowry; and if 100*l.* had been asked from him he must either have paid it or abandoned his cattle. Nay, according to this doctrine, the defendant might have refused to part with them on any terms. But it was impossible that such a wrong should be without a remedy; and the proper remedy was an action on the case.

[*289] Sir JAMES MANSFIELD said, that after the cattle were impounded and in the custody of the law, there *could be no tort on the part of the defendant in detaining them; and therefore, unless there was evidence given in support of the other counts of the declaration, he should nonsuit the plaintiff.†

* * * * *

† Lord COKE in a few words sums up the law upon this subject with great perspicuity, and removes the difficulty of the person whose cattle are rightfully distrained being entirely without remedy, if the distrainer refuses to accept of reasonable amends tendered after the impounding. "Note, reader, this difference, That tender upon the land before the

distress makes the distress tortious; tender after the distress and before the impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful; for then it comes too late; because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and

ROGERS AND OTHERS v. ALLEN.†

(1 Camp. 309—315.)

1808.
March 9.*Home
Circuit.
Lent
Assizes.
[309]*

To prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo* are evidence, without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery.†

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor.

A right of fishery is divisible, and may be lost as to part, and preserved as to part. Therefore an exclusive right to dredge for oysters in a navigable river may subsist as appurtenant to a manor, although it be lawful for all the King's subjects to catch floating fish therein.

In trespass for breaking and entering a several fishery, if the plaintiff prescribes for the sole and exclusive right of fishing over four places in a navigable river, upon which right issue is joined, the prescription must be proved as extensively as it is laid; and if the right is shewn to exist over three of these places, but not the fourth, this is a fatal variance, notwithstanding that the trespasses complained of were committed in a part of the river where the sole and exclusive right of fishery prescribed is proved to exist.

TRESPASS for breaking and entering the several oyster fishery of the plaintiffs in a certain river called Burnham river; and in the avowant has returned irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of detainue for the detainer after: or he may, upon satisfaction made in Court, have a writ for the delivery of the goods." *Sir Carpenters' case*, 8 Co. 147 a. So GILBERT, C. B. says, "The detainer is unlawful, where the avowant hath return irreplevisable, and the owner of the beasts tenders all that appears to be due on the judgment in the avowry; for though by the judgment the return is made irreplevisable, yet that is no final condemnation of the beasts or goods distrained; they are still to be considered as pledges in the hands of the avowant, and therefore in their own nature liable to a redemption upon payment or satisfaction of that rent or damage, for

which they were originally taken." *Gilb. Dist.* 61. *Vide* 2 Inst. 107; 5 Co. 76 a; *Roberts v. Young*, 1 Brownl. 173; *Vaspor v. Edwards*, 12 Mod. 661; *Allen v. Bayley*, 2 Lutw. 1596.

A rule was obtained in the ensuing Term to shew cause why this nonsuit should not be set aside; but was afterwards discharged, the judges being unanimously of opinion that an action on the case would not lie for refusing to deliver up the cattle, and that the witnesses adduced to prove the right of common had been properly rejected—*Ut audiui*.§

† *Smith v. Andrews* (1891) 2 Ch. 678, 65 L. T. 175.

‡ See decision on this point referred to by Lord BLACKBURN in *Bristow v. Cormican* (1878) 3 App. Cas. 641, 668.—R. C.

§ The case of *Ancombe v. Shore*, at this latter stage is reported in the Common Pleas in 1 Taunt. 261, which

confirms the above statement, and adds nothing which is now of any importance.—R. C.

ROGERS
and Others
v.
ALLEN.

divers parts of the said fishery, to wit &c. (naming four places in Burnham river) fishing and dredging for oysters, &c. A second count charged the defendant with fishing and dredging for oysters in divers parts of the fishery, between a certain place in the river called Clayclods, and a certain other place in the said river called Raysand. The last count was general, stating that the defendant broke and entered a certain other several oyster fishery, and also a certain free fishery of the plaintiffs. Pleas, 1. the general issue; 2.—after averring the different fisheries mentioned in the declaration to be the same, that the place in which &c. is a navigable river, and arm of the sea, in which all the King's subjects have a right to fish and dredge for oysters. The plaintiffs in their replication to the last plea prescribed under the persons seized in fee of the manor of Burnham, for "the sole, several, and exclusive liberty and privilege of fishing for, taking, and carrying away all oysters and oyster spats in and upon the said several parts of the said fishery, in which, &c. in the said declaration *particularly mentioned, as to the said manor belonging and appertaining." Rejoinder, traversing this prescription; and issue thereupon.

[*310]

An *inquisitio post mortem*, and several other documents from the Tower of London being put in, to shew that in very early times there had been a fishery at the mouth of the Burnham river held by the Fitzwalters, the ancestors of the family now in possession, as parcel of the manor of Burnham; and three judgments being proved, which had been obtained in the reigns of Charles I. and Charles II. by the lords of the manor of Burnham, in actions for breaking and entering their several fishery in the Burnham river;† in further support of the prescriptive right, certain licences were offered in evidence, which appeared on the court rolls of the manor, and bore date from the year 1661, downwards to the end of the 17th century; whereby the lords of the manor, in consideration of certain rents, had granted the liberty of fishing and dredging for oysters in their several fishery in the Burnham river, reserving to themselves the exclusive right to all floating fish therein.

† *Reed v. Jackson*, 6 R. R. 283 (1 East, 355).

The defendant's counsel objected to the admissibility of the licences as evidence, unless it should appear by bailiff's accounts, or otherwise, that rent had actually been paid under them; urging that if they could be received without this, it would be easy to manufacture *evidence which now, or at some future time, might establish an unfounded claim, to the injury of some other individual, or to the exclusion of the public.

ROGERS
and Others
v.
ALLEN.

[*311]

HEATH, J. said, he could not distinguish these licences from old leases, which were always received in evidence, in favour of those claiming under the lessors. Nor did he think it necessary to prove payment under the licences, as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved. However, to give any weight to these licences, it must be shewn that in later times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in.†

After the licences, a regular set of leases, or agreements for leases, of the oyster fishery during the whole of the last century were produced, and it appeared that for the last forty years rent had regularly been paid under them. It was likewise proved, that as far back as could be remembered by the oldest witnesses, when strangers came to dredge for oysters within the limits of the fishery, they had constantly been driven off by a watchman kept for that purpose.—The plaintiff's case being closed—

Several grounds of defence were opposed to it.—In the first place it was strenuously contended that a grant from the Crown ought to have been produced, and that a several fishery in a navigable river could not pass as appurtenant to a manor.—But

[312]

HEATH, J. said, there was no authority for this supposition,

† Vide *Roe ex d. Bebbbee v. Parker*, *Heaton*, 4 T. R. 669; *Outram v. 5 T. R. 26*; *Barry v. Bebbington*, 2 *Morewood*, 5 T. R. 121.
R. R. 450 (4 T. R. 514); *Stead v.*

ROGERS
and Others
v.
ALLEN.

and that the fishery might well pass as an appurtenance of the manor.†

[*313]

The defendant afterwards gave in evidence that all who chose had been accustomed to fish in the Burnham river for all sorts of floating fish, without any interruption. It was therefore contended on his *part, that this completely disproved the exclusive right claimed by the lord of the manor of Burnham. A fishery must be entire; and it appeared from the licences and • leases that the lords of the manor set up exactly the same pretensions to the floating fish as they did to the ground fish. Now as it had been clearly proved that it was lawful for all the King's subjects to catch the former, so might they lawfully dredge for the latter. This was like the right of free warren. If that were claimed in a particular place; and it appeared that hares and partridges (though not pheasants) had always been killed there in the same manner as over the rest of the country, it was impossible that the claim could be sustained.

HEATH, J.:

A right of fishery and a right of free warren are not at all like each other. The one is divisible, the other is not. Part of a

† A prescription for common of fishery as appurtenant to certain ancient tenements is bad; since all the King's subjects of common right may fish in the sea, and a man might as well prescribe, that he and all those whose estate he has, have a right to travel on the King's highway. *Ward v. Creswell*, Willes, 265; 16 Vin. Abr. tit. Piscary (B). But it has been decided that there may be a prescriptive right in a subject to a several fishery in an arm of the sea. *Mayor of Orford v. Richardson*, 4 T. R. 439; 2 H. Bl. 182, S. C. And though *prima facie* every subject has a right to take fish found upon the seashore between high and low water mark, such general right may be abridged by the existence of an

exclusive right in some individual. *Bagott v. Orr*, 5 R. R. 668 (2 Bos. & P. 472). As a right to a several fishery in an arm of the sea is raised by grant, and not like the royal franchise of deodands and felons' goods, by matter of record, it may, according to the common rule, be prescribed for in a *que estate*. Co. Litt. 114; 2 Blac. Com. 265. Indeed it cannot be expressly claimed under an existing grant from the Crown; as a grant to support it must be as old as the reign of Henry II. and therefore beyond time of legal memory; for by the second and third charters of Henry III. all the rivers fenced in from the beginning of the reign of Richard I. were directed to be laid open, 2 Blac. Com. 39.

fishery may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham ; but it by no means follows that they are justified in dredging for oysters, which may still remain private property.

ROGERS
and Others
v.
ALLEN.

It was next contended, that the plaintiffs must be nonsuited on account of a variance between the evidence *and the pleadings. It appeared that for certain oysters laying on one of the places mentioned in the declaration the plaintiffs paid rent to the Earl of Winchelsea, and there was evidence of oysters being taken under a claim of right from another of these places by the occupier of the adjoining lands. On the supposition, therefore, that the exclusive right of the lords of the manor of Burnham to the oysters in the two places last alluded to was negatived, it was insisted that the prescription, on which issue was joined, had not been made out as laid. The replication prescribed for “the sole and exclusive liberty and privilege of fishing for, taking and carrying away all oysters in and upon the said several parts of the said fishery in the said declaration particularly mentioned.” But the part for which rent was paid to Lord Winchelsea and the part from which oysters had been taken by the occupier of the adjoining ground were particularly named in the first count of the declaration, and were comprehended within the limits mentioned in the second. As to these the lord of the manor had no exclusive right, and therefore the prescription failed. The plaintiffs had prescribed too largely ; and if they were still to have a verdict and judgment, the consequence would be, that this record would afterwards be evidence of a right which had been expressly disproved in the course of the trial.

[*314]

HEATH, J. was of opinion, that although the prescription was more extensive than the evidence would establish, this was immaterial, unless the trespasses had been committed in the excepted places ; and the plaintiffs *had a verdict : but the Court of King’s Bench being afterwards moved to set aside the verdict, on account of a misdirection of the Judge upon this point, held

[*315]

ROGERS
and Others
v.
ALLEN.

that the prescription laid in the replication was negatived by the evidence, and ordered a new trial.†

† A party prescribing does not fail, although the prescriptive right is found to be more ample than was laid. As where the prescription was to tether horses in a particular place *ab et post festum Pent. annuatim*, and the verdict found that they had used to do so in *vigil. Pentecostes, in festo Pentecostes, die Lunæ in septimana Pentecostes, aut postea ad suum libitum annuatim*; this finding, though larger than the prescription laid, was adjudged well to support it. *Johnson v. Throughgood*, Hob. 64. So where the prescription was for common for 100 sheep, and found for 100 sheep and six cows, it was held good. *Bushwood v. Bond*, Cro. Eliz. 722; Bul. N. P. 59. But it is essentially necessary to prove the prescriptive right to exist to the full extent in which it is claimed. In *Rotherham and Green*, Noy 67, which was an action of trespass, the defendant justified under a 'prescriptive right of common on 500 acres; and it being found by the verdict, that his ancestors had released the right in five of the acres, it was held that the defendant had failed in his prescription. In *Conyers and Jackson*, Clayt. 19, it is said that a man having an acre of freehold in a field on which there is a right of common cannot prescribe for common in the whole field, because that would extend the *prescription to his own land. Therefore where a man has land in a common field, in prescribing for a right of common over it, he is obliged to except his own land. *Sir Miles Corbett's case*, 7 Co. 5; *Hickman and Thorney*, Freem. 211. In *Fring and Henley*, Bul. N. P. 59, WARD, C. B., held that if the plaintiff, in replevin for taking cattle, to an avowry for

damage feasant, prescribe for common for all commonable cattle, evidence of a right of common for sheep and horses only will not maintain the issue; although if he had a general common, and had prescribed for common for any particular sort of cattle, it would have been good. And in the late case of *Kingsmill v. Bull*, 9 East, 185, it being stated as a custom in a manor, that the lord immemorially until a division of a certain tenement into moieties had a heriot, and since the division had a heriot for each moiety; it was held that the whole being stated as one custom, it was disproved by shewing the division to have taken place within time of memory. The case of *Griffith v. Williams*, Wils. 338, seems contrary to the rule that prescriptions are entire and can neither be split by those who claim them nor by the opposite party. There the defendant prescribed for a duty, and right to distrain for it, and it was held sufficient to traverse either of them; DENISON, J., saying, "Suppose a man claims a right to common *pur cause de vicinage* in A. and B. it was never doubted but that a traverse of the right in A. would be sufficient." However, in *Morewood and Wood*, 4 T. R. 157,† which was trespass for entering S. common, the defendant pleaded that S. common and S. green were open to each other, and prescribed for a right in both the common and the green. The replication traversed the right in the common only, and the rejoinder tendered issue on the right in the common and the green. To this rejoinder, the plaintiff demurred on the ground that the right in the green was immaterial and irrelevant; but it was held that

[*316]

† 2 R. B. 349.

REX *v.* EDWARD BALL.†

(1 Camp. 324—326.)

1808.

March 23.

Upon an indictment for uttering a forged bank note, knowing it to be forged; to shew the prisoner's knowledge of the note mentioned in the indictment being a forgery, evidence is admissible of his having a short time before uttered another forged bank note of the same manufacture, and of a number of others likewise of the same manufacture, with his hand writing on the back of them, having been in circulation.

Lent Assizes.

[324]

THIS was an indictment against the prisoner on 45 Geo. III. c. 89, for disposing of and putting away a forged bank note, which purported to be a promissory note of the Governor and Company of the Bank of England, knowing the same to be forged.

[*325]

The trial came on at the Summer assizes at Lewes, in 1807, before Heath, J. when clear proof was adduced, that the note in question was forged, and that it had been uttered by the prisoner at East Bourn, on the 17th day of June in that year;—so that the only remaining question was, as to his guilty knowledge of the forgery. To establish this, evidence was offered and admitted, that on the 20th of March preceding, he had passed off a 10*l.* Bank of England note likewise forged, and of the same manufacture; and that there had been paid into the Bank of England various forged notes, dated between Dec. 1806, and March 1807, all of the same manufacture, and having different indorsements upon them in the hand writing of the prisoner. It likewise appeared that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind with those produced.

The jury found the prisoner guilty; but sentence was respited for the purpose of taking the opinion of the twelve Judges as to the admissibility of the evidence.

The prisoner being now brought to the bar,

the prescription being entire, though it was pleaded more largely than necessary, the rejoinder was proper; and that as every prescription was founded on a grant, one could not be partially traversed any more than the other.

† S. C. Russ. & Ry. 132. The report in 1 Campbell is referred to as the true and authentic report of the case, by Lord COLERIDGE, C.J., in *Reg. v. Gibson* (1887) 18 Q. B. D. 537, 541, 56 L. J. M. C. 49, 56 L. T. 367.—R. C.

REX
v.
EDWARD
BALL.

[326]

HEATH, J. delivered the opinion of the Judges, in the following address to him :

At the last assizes you were tried and convicted of uttering a forged bank note, knowing it to be forged. Evidence was given that you had uttered another note, forged in like manner with that before the jury, two months preceding the time when the note mentioned in the indictment was uttered ; also that on searching the files of the Bank, a number of other notes were found to the amount of about sixteen or twenty, forged in the same manner, and all indorsed with your hand writing, from whence it appeared that they had all been in your possession. A doubt arose in my mind whether it was proper that this evidence should be received ; and I reserved the case for the opinion of all the Judges. After mature deliberation they are of opinion, that the evidence was admissible to prove your knowledge that the note was forged ; and on consideration, there can be very little doubt of the propriety of receiving it. Every thing that you said or did was proper to be admitted, to shew your knowledge of the forgery ; and the circumstances were such as to leave no doubt in the minds of the jury, that you knew the note in question to have been forged.

The Judge then proceeded to pass upon him the usual sentence of the law.†

† Vide *Rex v. Wylie*, 1 Bos. & P. *Worthy* (1 Camp. 337—341). Reported below, p. 749. (N. R.) 92 ; *Duke of Norfolk v.*

K. B. (AT NISI PRIUS) EASTER TERM.

BOWRY v. BENNET, SPINSTER.†

(1 Camp. 348—349.)

1808.
June 3.

[348]

If articles of dress are sold to a woman of the town, an action will lie to recover their value, although the seller knew the way of life of the purchaser; unless he furnished them with a view to enable her to carry it on, and he expected to be paid from the profits of her prostitution.

ASSUMPSIT to recover the value of certain clothes furnished by the plaintiff to the defendant. Plea, the general issue.

The defence set up was, that the defendant was a woman of the town; that this was well known to the plaintiff, and that the clothes in question were for the purpose of enabling the defendant to carry on her business of prostitution.

The evidence to bring home a knowledge of the *defendant's way of life to the plaintiff, was very slight; and

[*349]

Lord ELLENBOROUGH said, it must not only be shewn that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it. In that case the contract was corrupt and illegal, and such as could not be enforced in a court of justice; but it was not to be considered of this description from the mere circumstance of the defendant being a prostitute, even within the plaintiff's knowledge.

The plaintiff had a verdict.†

† Cited in the judgment of V.-C. KINDERSLEY in *Smith v. White* (1866) L. R. 1 Eq. 626, 630, 35 L. J. Ch. 454, 14 L. T. N. S. 350. The citation, as reported, is incorrect; but the case is correctly cited as an authority for the decision, which was that the transaction in question—the assignment of the lease of a house with full knowledge of the intention to continue the use of it as a brothel—

was so tainted with the immoral purpose that no action would lie upon the covenants of the deed of assignment. Cf. *Pearce v. Brooks* (1866) L. R. 1 Ex. 213, 35 L. J. Ex. 134—R. C.

‡ So it is no bar to an action for the use and occupation of a lodging, that the defendant was an infant and a prostitute; “as both an infant and a prostitute must have a lodging.”

1808.
June 4.

TABART v. TIPPER.†

(1 Camp. 350—354.)

[350]

In an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to shew, that the supposed libel is a fair stricture upon the general run of the plaintiff's publications.

In an action for a libel, if separate passages of the libel are to be set out in one count of the declaration, they ought to be described as separate and distinct from each other.

Although it is lawful for an author to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable falsely to impute to him the publication of any immoral or absurd literary production.

THIS was an action for a libel on the plaintiff, contained in a periodical work called "The Satirist or Monthly Meteor," published by the defendant. The declaration, after stating that the plaintiff was a publisher and vendor of books for children, and always published and vended books of an useful, moral and proper tendency and description for their use, alleged that the defendant contriving and maliciously intending to injure the plaintiff in his good name and character, and to cause it to be suspected and believed, that he published and vended books of an absurd, immoral, and improper tendency and description for

Crisp v. Churchill, [cited in *Lloyd v. Johnson*] 4 R. R. 822; (1 Bos. & P. 340). And an action may be maintained against a female of this description for the amount of a washerwoman's bill, although it should appear that the articles washed consisted principally of expensive dresses and gentlemen's night caps. Per BULLER, J.: "This unfortunate woman must have clean linen; and it is impossible for the Court to take into consideration which of these articles were used by the defendant* to an improper purpose, and which were not." *Lloyd v. Johnson*, 4 R. R. 822 (1 Bos. & P. 341). But wherever anything is done directly in furtherance of immorality, the maxim *ex turpi causâ non oritur*

actio applies. Thus, if a lodging is knowingly let for the purposes of prostitution, an action will not lie for the use of it. *Girardy v. Richardson*, 1 Esp. Cas. 13. So in an action for board and lodging, where it appeared that the plaintiff kept a house of bad fame, and besides what she received for the board and lodging of the unfortunate women who lived with her, partook of the profits of their prostitution, Lord KENYON declared, that such a demand could not be heard in a court of justice. *Howard v. Hodges*, Selw. N. P. 60.

† See the nature of the question of "fair criticism" considered in *Merivale v. Carson* (C. A. 1887) 20 Q. B. D. 275, 58 L. T. 331.—R. C.

[*350]

children, composed and printed the libel in question. Plea, the general issue.

TABART
v.
TIPPER.

Garrow, in cross examining one of the plaintiff's witnesses, asked him whether the plaintiff had not published such and such books; with a view to shew, that the supposed libel was a fair stricture upon the common run of the plaintiff's publications.

[351]

Topping objected to this evidence as inadmissible under the general issue of not guilty.

Garrow maintained, that the evidence was clearly receivable, as it went to negative the malice imputed to the defendant; and cited *Anthony Pasquin's* case as in point, where in an action for a libel upon an author, Lord KENYON admitted evidence of the nature of the plaintiff's works, and it appearing that they were themselves of a libellous and scandalous description, his Lordship threw his parchment at his head, and dismissed him from the Court with infamy.

LORD ELLENBOROUGH :

The main question here is, *quo animo* the defendant published the article complained of; whether he meant to put down a nuisance to public morals, or to prejudice the plaintiff? To ascertain this, it is material to know the general nature of the plaintiff's publications to which the libel alludes; and I therefore think that the evidence is receivable. The plaintiff is bound to shew that the defendant was actuated by malice, and the defendant discharges himself by proving the contrary. Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion *is essentially necessary to the truth of history and the advancement of science. That publication therefore I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality.

[*352]

TABART
v.
TIPPER.

The cross examination accordingly proceeded.

When the libels came to be read, an objection was taken to the first count for a variance. It was averred in this count, that the defendant composed and printed a libel, "containing therein, the false, scandalous, malicious and defamatory words and matter following of and concerning the said plaintiff in his aforesaid trade and business, that is to say, &c." The libel was then set out, which, after some sentences containing a mock panegyrick upon a poem supposed to have been lately published by the plaintiff, appeared on the record with proper innuendos as follows. "Not to tire your numerous readers with needless prolixity, I proceed to the magnificent

"POEM.

"There was a little maid
And she was afraid,
Her sweet heart would come to her,
She bound up her head
When she went to bed,
And she fastened her door with a skewer.

[353] "But, sir, a truce to trifling, &c."

In the book itself, immediately after the doggerel verses, there were these Latin words, which were omitted by the pleader in drawing the declaration:

Dixin' ego vobis Atticam quandam inesse elegantiam?

LORD ELLENBOROUGH said, the libel was here set out as if it were an entire and continuous part of the book from which it was taken. But in fact it consisted of two separate and divided parts of the book. The declaration proposed to do one thing and did another. The more correct way would have been to have said; "in a certain part of which said libel, there was and is contained &c., and in a certain other part of which said libel, there was and is contained &c." However, in this instance the sense was not altered by the passage omitted; if it had, he should have directed a nonsuit.

TABART
v.
TIPPER.

The 3rd count, framed like the first, was for a libel contained in another number of "The Satirist," professing to offer certain strictures upon the article above mentioned, and set out the following sentence: "My sarcastic friend, by leaving out the repetition or chorus of Mons. T.'s poem, greatly injures the *tout ensemble*, or general and combined effect." In the book itself it ran, "My sarcastic friend ΜΩΡΟΣ, by leaving out &c."

It being objected that the omission of the name of the person alluded to, materially altered the meaning of the sentence,——

[334]

Lord ELLENBOROUGH declared himself of the same opinion, and held that the plaintiff was not entitled to a verdict upon the 3rd count.

On the part of the defendant it was allowed, that the plaintiff had not published the poem imputed to him; but it was urged that this was intended as a just specimen of his publications.

Lord ELLENBOROUGH however informed the jury, that it was certainly actionable gravely to impute to a bookseller having published a poem of this sort, to which he was a stranger; as the evident tendency of the unfounded imputation was to hurt him in his business.

The plaintiff had a verdict with one shilling damages.†

† In a case decided at the sittings after Trinity Term, but which, from its being intimately connected with *Tabart v. Tipper*, it may be convenient to introduce here, Lord ELLENBOROUGH *held, that it is not libellous to ridicule a literary composition or the author of it, in as far as he has embodied himself with his work; and that if he is not followed into domestic life for the purposes of personal slander, he cannot maintain an action for any damage he may suffer in consequence of being thus rendered ridiculous.

SIR JOHN CARR, KNT. v. HOOD
AND ANOTHER.†

London Sittings after T. T.
48 Geo. III.

(1 Camp. 355—359.)

[*335]

The declaration stated, that the plaintiff, before the publishing of any of the false, scandalous, malicious, and defamatory libels thereafter mentioned, was the author of, and had sold for divers large sums of money, the respective copyrights of divers books of him the said Sir John, to wit a certain book entitled

† Followed (with a reservation) by BEST, C.J., in *Thompson v. Shackell*

(1828) Moody & Malkin, p. 187.—
B. C.

1808.
June 9.

[364]

WILLIAMS, SPINSTER, *v.* INNES AND OTHERS,

EXECUTORS, &c.

(1 Camp. 364—366.)

If A. refers B. for information upon any particular subject to C., what C. says concerning it, when applied to by B. or his agent, is evidence for B. in an action against A.

COVENANT on an indenture, whereby the defendants' testator covenanted to marry the plaintiff within a certain time, or to

CARR
v.
HOOD.

[*366]

"The Stranger in France," a certain other book, entitled "A Northern Summer," a certain other book, entitled "The Stranger in Ireland," &c. which said books had been respectively published in 4to, yet that defendant intending to expose him to, and to bring upon him great contempt, laughter and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said Sir John, and of and concerning the said books, of which the said Sir John was the author as aforesaid, which same libel was entitled "My Pocket Book, or Hints for a Ryghte Merrie and conceited Tour, in quarto, to be called 'THE STRANGER IN IRELAND IN 1805' (thereby alluding to the said book of the said Sir John, thirdly above mentioned), by a knight errant (thereby alluding to the said Sir John)," and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, 1st and 2ndly above mentioned, therein called "Frontispiece," and entitled "The Knight (meaning the said Sir John) leaving Ireland with Regret," and containing and representing in the said print, a certain false, scandalous, and malicious, defamatory, and ridiculous repre-

sentation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket handkerchief to his face, and appearing to be weeping, and also containing therein, a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a *man loaded with, and bending under the weight of three large books, one of them having the word "Baltic," printed on the back thereof, &c. and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "Wardrobe" depending therefrom (thereby falsely, scandalously, and maliciously, meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt, that one copy of the said 1st mentioned book of the said Sir John, and two copies of the said book of the said Sir John 2ndly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket handkerchief), and which said libel also contained, &c. &c. The declaration

pay her annuity. The defendants (*inter alia*) pleaded that they had fully administered.

WILLIAMS
v.
INNES,
and Others.

To prove assets in their hands, an account rendered by them

concluded by laying as special damage, that the said Sir John had been prevented and hindered from selling to Sir Richard Philips, Knt., for a large sum of money, to wit 600*l.*, the copyright of a certain book or work of him the said Sir John, of which the said Sir John was the author, containing an account of a tour of him the said Sir John through part of Scotland, which but for the publishing of the said false, scandalous, malicious, and defamatory libels, he the said Sir John would, could, and might have sold to the said Sir Richard Philips for the said last mentioned sum of money, and the same remained wholly unsold and undisposed of, and was greatly depreciated and lessened in value to the said Sir John. Plea, not guilty.

Lord ELLENBOROUGH, as the trial was proceeding, intimated an opinion, that if the book published by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

Garrow for the plaintiff allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he

must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon in a scientific work should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of this infirmity, with a caricature print as a frontispiece. The object of the book published by the defendants clearly was, by means of immoderate ridicule to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tipper v. Tabbart* his Lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

CARR
v.
HOOD.

LORD ELLENBOROUGH:

In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and errors of another may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's "Tour through Scotland" is now unsaleable; but is he to be indemnified by receiving a

WILLIAMS
v.
INKES
and Others.

CARR
v.
HOOD.

to the plaintiff was given in evidence, in which they stated that 1,000*l.* had been awarded as due to the testator's estate from a

compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Shew me an attack* on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

[*358]

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

The *Attorney-General* having addressed the jury on behalf of the defendants—

LORD ELLENBOROUGH said :

Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside

from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the Court. We ought to resist an attempt against free and liberal criticism at the threshold.—The CHIEF JUSTICE concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it any

person who had been *jointly concerned with him in under-writing policies of insurance.

WILLIAMS
v.
INNES
and Others.

'[*365]

Lord ELLENBOROUGH held this not to be sufficient proof of assets, as it did not shew that any part of the sum awarded had been received by the executors.

A letter from the defendants to the plaintiff was then put in, stating to her, that if she wanted any further information

thing personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, *and they would award him damages accordingly.

It was contended, on the part of the defendants, that every one has a right to canvass the proceedings of courts of justice, and that the article complained of was a fair exercise of that right.

REX
v.
WHITE.

[*359]

Verdict for the defendants.

GROSE, J. said :

So, though it is an aggravated misdemeanor to publish an invective against judges and juries with a view to bring into suspicion and contempt the administration of justice in the country, still it is lawful with candour and decency to discuss the merits of the verdict of a jury or the decisions of a judge.

It certainly was lawful with decency and candour to discuss the propriety of the verdict of a jury or the decisions of a judge, and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper set out in the information contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country.

REX v. WHITE AND ANOTHER.

London Sittings, after E. T.

48 Geo. III. cor. GROSE, J.

(1 Camp. 359.)

This was an information filed by the *Attorney-General* against the proprietor and printer of a Sunday newspaper, called *The Independent Whig*, for a libel upon Mr. Justice Le Blanc and the jury before whom the captain of a merchant ship had been tried for murder, at the Old Bailey.

The defendants were found guilty on this and a similar information, and

Sentenced to three years' imprisonment.

The libel affirmed the prisoner to have been guilty of murdering one of his crew, and in a gross and abusive style censured the judge and jury for acquitting him.

Vide *M'Dougal v. Claridge*, p. 679, ante, 1 Camp. 267, and the cases there referred to.

WILLIAMS
v.
INNES
and Others.

concerning the affairs of the deceased, she should apply to a Mr. Ross, a merchant in the city.

It was next proposed to adduce the plaintiff's attorney to prove that by her desire he had called upon Mr. Ross, who informed him that the whole of the 1,000*l.* had actually been received by the defendants.

Scarlett objected to the admissibility of this evidence as not being the best which the nature of the case admitted of, and contended that Ross himself should be called, who would then state upon his oath what he knew concerning this matter, and might be cross-examined as to the means of knowledge which he possessed. But

Per LORD ELLENBOROUGH :

If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself. This was agreed to be law by all the Judges on the trial of Mr. Hastings.

[366]

Upon the recommendation of the Chief Justice the cause was afterwards compromised.†

DANIEL
v.
PITT.
[366]

† DANIEL v. PITT.

K. B. Mx. Sittings after M. T. 1806.

4 R. R. 907 (2 Peake, 238).

(1 Camp. 366.)

Plaintiff brought his action against defendant for goods sold and delivered; and the defence was, that the goods in question never were delivered to the defendant. Plaintiff asserted that they had been delivered by a carman of the name of Coomes. Defendant in a conversation with plaintiff said, "if Coomes will say that he did deliver the goods, I will pay for them." Upon the trial plaintiff called a witness to prove that Coomes (who was since dead) had been applied to in consequence of defendant's referring to him, and

that Coomes had said, he did deliver the goods in question.

Marryat for the defendant objected to this evidence of what Coomes said; but

LORD ELLENBOROUGH, C.J. said :

Wherever a party refers to the evidence of another, he is bound by it—and this is constantly good evidence.

BROCK v. KENT, widow.

K. B. Sittings in London after M. T.
47 Geo. III.

(1 Camp. 366.)

Action for work and labour, &c.—
One item of the demand was for 2*l.*, which had been inserted in a former

BORNMANN v. TOOKE.

(1 Camp. 377—380.)

1808.
June 15.

[377]

By a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board to sail with the first favourable wind direct to the port of Portsmouth. The ship however unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. In an action of *indebitatus assumpsit* for the freight, held, that the plaintiff's covenant to sail direct to Portsmouth was not a condition precedent;† and that the deviation could not be given in evidence, either as a bar to the action, or to diminish the damages.

ASSUMPSIT to recover the sum of 2,136*l.* for freight upon a cargo of timber carried from Riga to Portsmouth for the defendant, by the ship *Les Bons Enfants*, whereof the plaintiff was master. Plea, the general issue.

The ship in question had been freighted by a charter-party, between the plaintiff and an agent of the defendant, dated 10th of April, 1807, and containing the following clause: "The freighter binds himself to load this ship with the greatest expedition with a full and fit cargo of masts, spars, and timber; with which cargo the captain must sail with the first favourable wind direct to the port of Portsmouth." The freight agreed upon was 3*l.* 5*s.* for each load of masts and spars, and 2*l.* 15*s.* for each load of timber.

bill paid by defendant; but in paying which, as plaintiff alleged, she had given him a forged 2*l.* Bank of England note. The inspector of notes proved that he carried back the note to defendant, who said if she paid it away, she had it from one Jones; and desired him to inquire of Jones about it. Witness then proceeded to state what Jones had told him; and this evidence was allowed, as defendant had referred to Jones for information upon this subject.

Vide *Emerson v. Blonden*, 5 R. R. 725 (1 Esp. Cas. 142); *Burt v.*

Palmer, 5 Esp. Cas. 145.

† So held where the condition was to sail with first convoy. *Davidson v. Gwynne* (1810) 12 East, 381. Reported 11 R. R. 420. Compare however *Freeman v. Taylor* (1831) 8 Bing. 124, where the freighter had refused to load, and the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract: This was held a right direction. And see a similar decision in *Jackson v. Union Marine Insurance Co.* (1874) L. R. 10 O. P. 125, 44 L. J. C. P. 27, 31 L. T. 789.—R. C.

BROCK
v.
KENT.

[366]

BOENMANN

TOOKE.

[*378]

It was allowed that the ship had arrived at Portsmouth, and that the cargo had been there delivered *to, and accepted by the defendant. His case was, that the ship had not sailed direct from Riga to Portsmouth, but had unnecessarily put into Copenhagen, on the 19th of July, where she was detained until that place surrendered to the English arms; on account of which deviation the defendant was obliged to have fresh insurances done upon her cargo. But

LORD ELLENBOROUGH intimated an opinion that these facts were no defence to the present action.

Park, for the defendant contended, that the plaintiff's sailing with the first favourable wind direct to Portsmouth, was a condition precedent to the freight becoming due; and that the damage suffered by the defendant from the imperfect execution of the contract might at any rate be given in evidence to reduce the plaintiff's demand.

LORD ELLENBOROUGH :

I am of opinion that this was not a condition precedent, and that the defendant, having accepted the cargo, must pay the stipulated freight. To hold that any short delay in setting sail or trifling departure from the direct course of the voyage would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going *inter apices facti*.† [*379] *If the plaintiff had proceeded merely on a *quantum*

† Vide *Constable v. Cloberie*, Palm. 397, where the plaintiff covenanted in a charter-party, that his ship should sail with the next wind upon a voyage to Cadiz; and the defendant covenanted that if the ship went the intended voyage and returned to the Downs, the plaintiff should have so much for the voyage. The defendant traversed that the ship sailed with the next wind; and upon demurrer the traverse was overruled; for the substance of the covenant was con-

sidered to be, that the ship should perform the intended voyage, that being the primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour. Where mutual covenants go only to a part of the consideration on both sides, and a breach may be paid for in damages, there the defendant having a remedy on his covenant, shall not plead it as a condition precedent. *Boone v. Eyre*, 2 R. R. 768 (1 H. Bl.

meruit for an indefinite sum, you might have reduced the damages by shewing a deficient performance of the contract. But here there is a specific agreement for specific freight. Therefore the defendant must bring his cross action for any loss he may have suffered from the default of the plaintiff.

BORNEMANN
v.
TOOKE.

It was then suggested that the plaintiff not having performed the charter-party on his behalf, was driven from it to a *quantum meruit*, so as to let in the proposed defence.

Lord ELLENBOROUGH however said, that if the sailing in the manner required by the charter-party was a condition precedent, then the plaintiff had no cause of action; but as it was not to be so considered, he had a right to recover for the freight according to the rate agreed upon.

The plaintiff had a verdict accordingly.†

[380]

K. B. (AT NISI PRIUS) TRINITY TERM.

CHALMERS AND OTHERS v. LANION.†

(1 Camp. 383—384.)

1808.
June 24.

In an action by the second indorsee against the acceptor of a bill of exchange, if the person who indorsed it to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due.

[383]

Action by the indorsees of a bill of exchange against the acceptor.

One of the grounds of defence was, that the bill had been accepted for a debt contracted in a smuggling transaction; and that although it had been indorsed for value before it became due to a *bonâ fide* holder, yet that it had been indorsed by him to the

273, n.); *Campbell v. Jones*, 3 R. R. ante, p. 624 (1 Camp. 38); *Fisher v. Samuda*, 1 Camp. 190.
283 (8 T. R. 570); *Hall v. Cazenove*,
7 R. R. 611 (4 East, 477). † See B. of E. Act, 1882, s. 36 (2).

† Vide *Farnsworth v. Garrard*, —R. C.

CHALMERS
and Others
v.

LANION.

[*384]

present plaintiffs after it was due.—The counsel for the defendant allowed that the first indorsee might have sued upon it ; † but contended that it came disgraced *to the plaintiffs ; that they took it subject to all the deficiencies under which it had at any time laboured ; and that it was now competent to the defendant to give the original consideration in evidence, in the same manner as if the action had been brought by the payee. But

Lord ELLENBOROUGH held, that if the plaintiffs received the bill from a person who might himself have maintained an action upon it, the circumstance of the indorsement to them having been made after the bill had become due was insufficient to let in the proposed defence ; and, on a motion for a new trial, the other judges of K. B. declared themselves of the same opinion.

1808.
July 7.

At Westminster.

[389]

NORTH v. MILES, KNT. AND ANOTHER, LATE SHERIFF OF MIDDLESEX.

(1 Camp. 389—390.)

In an action against the sheriff for a false return to a writ, what was said by the bailiff to whom the warrant under it was directed, when asked by the plaintiff's attorney before the return of the writ, why he did not execute it, is evidence against the sheriff.

CASE for a false return of *non est inventus*.

The writ was sued out by the plaintiff against a gentleman of the name of Bromley, who was acting at the time as under sheriff to the defendants. The warrant had been directed to one Leach, who appeared to have been accustomed to execute writs for the sheriff, although not proved to be a bound bailiff.

Leach being now called, swore, that he had used great exertions to take Bromley, without being able to find him. Evidence was however given, that after the writ had been delivered to the sheriff, and before its return, Bromley was attending the poll at Brentford during the Middlesex election, where one of the defendants presided as returning officer : and to shew

† *Newby v. Smith*, 2 Esp. Cas. 539.

that Leach, by his own acknowledgment, might have arrested him, it was proposed to ask the plaintiff's attorney, what Leach had said to him, when he enquired why the writ was not executed?

NORTH
v.
MILES.

The *Attorney-General* objected, that what then passed could not be evidence against the defendants, and that the plaintiff must be satisfied with what he could extract from Leach himself.

[390]

LORD ELLENBOROUGH :

The bailiff's general conversation with any indifferent person certainly is not evidence against the sheriff; but what he said on this occasion, when remonstrated with by the plaintiff's attorney, must be considered as part of his act touching the execution of the writ, for which the defendants are responsible. Where a thing is carried on by one as a *quasi* principal, what he says in the course of the transaction has been held on great consideration to be evidence against those he represents.

The witness then stated that Leach had declared, he dared not execute the writ, as Bromley had written that he would suspend any officer who had the audacity to arrest him; but that if he had an indemnity from one of the sheriffs, he would take him to-morrow.

The plaintiff had a verdict for the full sum for which Bromley ought to have been held to bail.†

† BOWSHER v. CALLEY, Esq. Sheriff of Wilts.

Sittings after T. T. 48 Geo. III.

(1 Camp. 391.)

Action for the escape of one Lancashire taken under a *ca. sa.* at the suit of the plaintiff. Lancashire being arrested in Wilts by an officer of the defendants of the name of Ginder, to whom the warrant was directed, was immediately brought by him to Bath,

where the plaintiff resided. Some questions being put as to what Ginder said while he had Lancashire in his custody at Bath, an objection was made that he ought to be called himself, and that what he said could not be evidence against the sheriff; but Lord ELLENBOROUGH held, that what he then said about bringing Lancashire to Bath was part of the act for which the defendant was responsible, and that the questions

[391]

1808.
July 8.

GREGORY v. PARKER.

(1 Camp. 394—395.)

[394]

In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years, is admissible evidence to take the case out of the Statute of Limitations.

ACTION for goods sold and delivered.—Plea, the Statute of Limitations.

[395]

The goods in question had been furnished above six years ago for the accommodation of the defendant's wife, who then lived at Brighton, the defendant occasionally visiting her. To take the case out of the statute, a letter addressed to the plaintiff was offered in evidence, written within the six years from Brighton by the defendant's wife, in which she admits the debt, and apologizes for its not being paid.

It was contended for the defendant, that this letter was not evidence against him, as the wife had no authority to write it, and the debt in the mean time might have been paid.

LORD ELLENBOROUGH :

The goods having been supplied for the wife's accommodation, I think she may be considered as her husband's agent respecting them, and that her letters are admissible evidence of an acknowledgment of the debt within six years to take the case out of the statute. If there be any evidence of payment in the mean time, I am ready to receive it.

The plaintiff had a verdict.†

BOWSHER
v.
CALLEY.

[391]

were therefore regular. However, it afterwards appeared that Lancashire had been brought to Bath by the plaintiff's own directions, and the defendant had a verdict.

Vide *Fabsley v. Doble*, 1 Ld. Raym. 190; *Biggs v. Lawrence*, 1 B. B. 740

(3 T. R. 454); *Maesters v. Abraham*, 1 Esp. N. P. Cas. 375; *Hdyear v. Hawke*, 5 Esp. N. P. Cas. 72; *Baerman v. Radenius*, 7 T. B. 663.

† Vide *Palethorp v. Furnish*, 2 Esp. Cas. 511 n.; *Burt v. Palmer*, 5 Esp. Cas. 145.

EDGAR v. BUMSTEAD.

(1 Camp. 411—412.)

1808.
July 22.

[411]

If an insurance broker, when a loss happens upon a policy which he has effected, pays the assured the full amount of the money subscribed, he cannot recover back any part of it upon the ground that before the loss happened one of the underwriters upon the policy had become insolvent, and that he was not aware of this fact when he paid the money.

ASSUMPSIT for money had and received, and on an account stated. Plea, the general issue.

The principal item in dispute between the parties was a sum paid by the plaintiff to the defendant under the following circumstances :

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (amongst others) by one Lomas. A loss happened; whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this, Lomas had become insolvent, without the plaintiff being aware of that fact; and it was now contended that he had a right to recover the sum he had paid to the defendant in respect of Lomas's subscription, as money paid under a mistake of fact. But

Lord ELLENBOROUGH held, that on account of the well-known course of dealing between the insurance broker, the merchant, and the underwriter, the money could not, under these circumstances, be recovered back from the assured.

Verdict for the defendant.

1808.
July 27.

BAYLEY AND OTHERS, ASSIGNEES OF PEARS, A
BANKRUPT, v. BALLARD AND OTHERS.

[416]

(1 Camp. 416—417.)

A trader in contemplation of bankruptcy, and without solicitation, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter; but before they were delivered, the creditor called upon the trader, and demanded payment of his debt. Held, that the intention to give a voluntary preference not being consummated, this was a valid payment.

TROVER for three cheques for the sum of 1,189*l.* 15*s.*

The case opened on the part of the plaintiffs was, that Pears in contemplation of bankruptcy had, without solicitation or legal process, paid these cheques to the defendants, and had thus given them a voluntary preference.

Pears carried on the business of a warehouseman and factor in this city, and the defendants were bill-brokers, with whom he had been in the habit of dealing. On Saturday, the 10th October, 1807, Pears being pressed for money to answer his acceptances, applied to the defendants for a loan; who accommodated him with the sum of 1,400*l.*, to be repaid in a day or two, and received from him, by way of security, a bill on Fisher & Atkinson for 270*l.* 10*s.*, and another on Hudson, Storr & Co. for 1,200*l.* On Tuesday, the 13th, Pears' affairs became desperate, and he stopped payment. About three o'clock in the afternoon of the same day, he sent his clerk to the defendants' counting-house with the three cheques in question. The clerk delivered them accordingly, saying,—"this is probably the last transaction we shall have together for some time: we are at a stand-still." But, after the cheques had been put into the clerk's hands for *the above purpose, and before they were delivered, a demand was made upon Pears at his counting-house by one of the defendants, for the repayment of the 1,400*l.*; and on receiving the cheques, they gave up the bill upon Hudson, Storr & Co. for 1,200*l.*

[*417]

LORD ELLENBOROUGH:

I am of opinion that this is not to be considered as a volun-

tary payment, one of the defendants having called at the bankrupt's before the cheques were delivered, although they had previously been put into the clerk's hands for that purpose. The intermediate demand takes it out of the cases hitherto decided upon this subject. There was an intention of giving a voluntary preference; but that intention not having been consummated, the payment stands good.

BAYLEY
and Others
v.
BALLARD
and Others.

Plaintiffs nonsuited.

TOULMIN v. INGLIS.†

(1 Camp. 421—423.)

1808.
July 29.

[421]

The underwriters on a policy of insurance are not discharged by an act on the part of the assured, which to a certain degree increases the risk, if it does not amount to culpable negligence. Therefore, where three Spanish prisoners of war were received on board a ship, and allowed the free range of it, who might have been reasonably expected to conduct themselves peaceably during the voyage, but who joined in a mutiny, and assisted to run away with the ship, the underwriters were held liable for a loss so happening.

THIS was an action on a policy of insurance on goods on board the *Adeona*, at and from the Cape of Good Hope to Buenos Ayres, or any port or ports in the river Plate, and at and from thence back to the Cape of Good Hope, or to England.

The declaration stated the loss to have happened by ten of the mariners belonging to the ship having barratrously obtained the command of her and run her ashore.

The defence was, that the underwriters were discharged by the careless and negligent conduct of William Hopley, one of the assured, in taking on board three Spanish prisoners, who had stirred up the mutiny which terminated in the loss of the ship.

A short time before the *Adeona* was to set sail, three Spaniards at the Cape of Good Hope upon their parole, with the concurrence of Hopley, presented a memorial to Sir David Baird, the Governor, praying for liberty to return to their relations and friends at Buenos Ayres by this vessel. The following answer was returned: "The memorialists may proceed in Mr. Hopley's vessel; but they must still be considered as prisoners of war,

† Compare *Pipon v. Cope*, p. 720, *post*, 1 Camp. 434.

TOULMIN
v.
INGLIS.
[*422]

and deliver themselves over to Major-General Beresford, to be exchanged for any British officers who may chance to be taken." The Spaniards were *accordingly conveyed on board by Hopley, who went as supercargo. No intimation was given to the captain that they were prisoners of war; so that neither their persons nor their baggage were examined, and they were allowed the full range of the ship. The rest of the crew consisted chiefly of foreigners. The Spaniards had been at liberty at the Cape, and behaved in a manner to disarm all suspicion, till the mutiny broke out. This happened as the ship was going up the river Plate. The Spaniards were at the time suspected to be at the bottom of the plot, but they did not take a more active part in it than others who joined them; among whom were four Englishmen.

LORD ELLENBOROUGH:

The question is, whether there has been here gross negligence in taking on board the three Spaniards? Did they materially enhance the risk? Every foreigner is more dangerous than a British subject; but it is not contended that the underwriters are discharged because the crew consisted in a great measure of foreigners. It is impossible to say that every thing which increases the risk vacates the insurance; or this effect would be produced by taking on board a cask of gunpowder, or any other inflammable matter. These Spaniards were not considered as dangerous at the Cape, where they were allowed to walk about at large, and they were not ordered to be transported by this ship, but were permitted, at their own request, to return home; where they were to deliver themselves up to be exchanged for any British officers who, by the fortune of war, might have fallen into the hands of the enemy. It might reasonably have been conceived, that it was unnecessary, *under these circumstances, to keep them in jealous custody, and that they might safely be constituted the guardians of their own honour. If there was no culpable inattention in taking them on board, and nothing arose afterwards to excite suspicion of their intentions, the underwriters remain liable.

Verdict for the plaintiff.

DONALDSON *v.* THOMPSON.

(1 Camp. 429—433.)

1808.
July 30.

The sentence of a Court of Admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognized in our Courts; and that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority.

[429]

THIS was an action on a policy of insurance on the American ship *Maryland Mary*, at and from Gibraltar to a market, with leave to call and land goods at two or more ports in the Mediterranean.

The ship having landed some goods at Malta, proceeded from thence on the 17th of May, 1807, with the rest of her cargo for Smyrna, but was the same day captured by a Russian privateer, and being afterwards carried into Corfu, was there condemned as lawful prize.

[430]

The defence set up by the underwriters was, that this American ship, by sailing for Smyrna, had violated the laws of neutrality; as that port was then blockaded by the Russians. However, the only evidence adduced to shew that the captain knew of the blockade before he left Malta, was the sentence of condemnation, in which this fact was positively averred. Upon the validity of this sentence, therefore, the cause entirely depended. It was pronounced by a prize commission which sat at Corfu in July, 1807, by the authority of the Emperor of Russia.

The plaintiff's counsel contended, on the authority of the case of the *Flad Oyen*, 1 C. Rob. Adm. Rep. 144, that the supposed Court could have no legitimate jurisdiction where it sat, and that its sentence was a nullity. Corfu was one of the islands which formed the Ionian Republic,—an independent Government recognized by the peace of Amiens, and which continued to preserve its neutrality amidst the struggles of the surrounding states. A belligerent, therefore, could have no right to hold a prize court there, consistently with the principles of the law of nations.

DONALDSON
v.
THOMPSON.

[*431]

On the other side, it was admitted, that if Corfu was to be considered as being, at the time of the condemnation, *an independent neutral state, the sentence could not be supported. But they undertook to prove that it was substantially part of the territory of the Russian Empire; and they insisted that this must be taken to be the case, if the Russian power was there dominant—if the supreme authority was vested in the Russian commander; although there might still be kept up some empty forms of an imaginary republic.

The condition of Corfu, in July, 1807, was described by a gentleman who had acted there as English Consul. He stated, that at that time, there was a Russian garrison in Corfu, and the Russians had about 6,000 men in the different islands of the republic; that they had made Corfu a military station for four or five years; and that they continued in possession of it till the peace of Tilsit, when they delivered it up to Bonaparte: but, that previously to that event, the flag of the Ionian Republic flew from the forts in the island; there was a port Admiral appointed by the Ionian Republic; a Consul from the Sublime Porte resided at Corfu, and the witness was recognized as English Consul by the Prince and Senate of the Ionian Republic, who continued in their functions till the republican Government was dissolved by the French.

LORD ELLENBOROUGH:

[*432]

I will not receive the sentence. Under these circumstances, the Russians must be considered as visitors in Corfu, and not as sovereigns. While a Government subsists as this did, we cannot look to the degree in which it might be overawed by a foreign force. The sentence was pronounced by a belligerent on neutral territory, and is *therefore void. I am by no means disposed to extend the comity which has been shewn to these sentences of foreign Admiralty Courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favour rests upon an authority in Shower,[†] which does not fully support it; and the practice

[†] *Hughes v. Cornelius*, 2 Show. 232.

of receiving them often leads in its consequences to the greatest injustice.

DONALDSON
v.
THOMPSON.

Verdict for the plaintiff.

In the ensuing Term, *Park* applied to the Court to set aside this verdict, on the ground that the sentence of the Russian prize court had been improperly rejected. He contended that Corfu, when occupied in the manner above described by the Russian troops, was either to be considered as a part of the Russian empire, or as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages in a military point of view from this occupation of the island, as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. A rule *nisi* was reluctantly granted: but cause being shewn, it was discharged.

LORD ELLENBOROUGH :

It is impossible to say that the Government of the Ionian Republic was superseded, at a time when its institutions subsisted, and its supremacy was recognized. How, then, was Corfu a *co-belligerent? Only because it endured an hostile aggression. Will any one contend that a government which is obliged to yield in any quarter to a superior force, becomes a co-belligerent with the power to which it yields? It may as well be contended, that neutral and belligerent mean the same thing. Indeed, this principle would make us co-belligerents with France, because we receded from Corunna. †

[*433]

† In *Smith v. Surridge*, 6 R. R. 837, 839 (4 Esp. N. P. Cas. 26), Lord KENYON is stated to have held, that the sentence of a Court of Admiralty, sitting under a commission from a belligerent in a neutral country, is valid, if acquiesced in by the government of the neutral country; but this doctrine is not only contrary to the case of the *Flad Oyen*, and other decisions of Sir WILLIAM SCOTT, but is inconsistent with what was laid down by Lord KENYON himself in

Havelock v. Rockwood, 8 T. R. 276, where the foreign sentence which was rejected, had been pronounced at the same place and under the same circumstances as that supposed to have been recognized in *Smith v. Surridge*. In France, no sentences of foreign courts, of whatsoever description they may be, were received as evidence in suits in which Frenchmen were parties. Emerigon, tom. 1, p. 458.

1808.
July 30.

PIPON v. COPE.

(1 Camp. 434—436.)

[434]

If through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized as forfeited, the underwriters are not liable for the loss.

If a ship is justly seized as forfeited for smuggling, and afterwards restored, the underwriters are not liable for any damage happening to the ship by the perils of the sea, in the interval between the seizure and restoration.

THIS was an action on a policy of insurance on the ship *General Doyle*, for 12 months from the 15th day of October, 1806, warranted "free from captures and seizures and the consequences of any attempt thereof." The declaration stated several average losses to have accrued upon the ship during that period, by the barratry of the mariners and by the perils of the sea.

The *General Doyle* was employed as a post-office packet, between Weymouth, and Guernsey and Jersey. Government indemnified the owner against capture or damage by the enemy, and his object was to cover all other risks by the present policy.

The acts of barratry relied upon were constituted by the taking of smuggled goods on board the ship. Upon her return to Weymouth soon after the policy was effected, considerable quantities of spirits and tobacco were found concealed in different parts of her, which had been placed there by the sailors, without the knowledge of the plaintiff. She was seized in consequence; but was afterwards liberated, on satisfaction being made to the seizing officers. She again sailed with a fresh crew, who were admonished to beware of any infraction of the revenue laws. Notwithstanding this, they took large parcels of salt on board at Jersey, which being afterwards discovered, the vessel was seized a second time. However, she was released *as before, and made another trip. As soon as she returned, she was seized a third time for having spirits and tobacco on board, which had been secretly stowed away by the mariners. While she lay under seizure on this occasion in Weymouth harbour, another

[*435]

ship was driven against her by the force of the tide, and did her considerable damage. A petition to the board of Customs was in the mean time presented by the plaintiff, stating his entire ignorance of these smuggling transactions; and the ship was once more restored to him on the usual terms. His demand against the underwriters was made up of the sums given to procure these restitutions, and the sum laid out in repairing the vessel from the damage she had sustained.

PIPON
v.
COPE.

The *Attorney-General* contended, that the underwriters were liable for all these losses, notwithstanding the warranty. That only extended to captures and seizures by the enemy, against which the plaintiff had no occasion to insure, being indemnified by Government. The sums paid to the revenue officers were a necessary effect of the barratry of the mariners, in carrying smuggled goods on board without the privity of the owner. These payments were in truth greatly for the benefit of the underwriters, as the ship had been completely forfeited, and they might have been called upon for a total loss. With respect to the repairs, there could not be the smallest doubt; as this loss was not occasioned by any capture or seizure of any sort, but arose from a common sea risk, for which the defendant had become answerable.

LORD ELLENBOROUGH :

[436]

I can conceive, that as by captures in the warranty, hostile captures are evidently meant, so by "seizures," must be understood seizures *ejusdem generis*. But this is a clear case of *crassa negligentia* on the part of the assured. It was the plaintiff's duty to have prevented these repeated acts of smuggling by the crew. By his neglecting to do so, and allowing the risk to be so monstrously enhanced, the underwriters are discharged. Nor can he recover for the repairs. The ship being under seizure when she was run foul of, he had then ceased to have any property in her. If a vessel is seized *pro justâ causâ*, the property is immediately vested in the Crown. This is different from *Lord Keith's* case, where the ship had been unjustly seized, and the property was not considered to have been divested from

PIFON
v.
COPE.

the owner.† Here giving back the ship was an indulgence, and after such continued negligence on the part of the plaintiff, rather an extraordinary one.

Plaintiff nonsuited.

1808.
July 30.

CROWDER AND OTHERS v. SHEE.

(1 Camp. 437—439.)

[437]

Although an attorney shews his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is still bound to leave a copy of the bill with him, according to the provisions of stat. 2 Geo. II. c. 23,† before he can maintain an action upon it. But where several are jointly liable to an attorney for business done, the delivery of a copy of the bill to one of them is sufficient to maintain a separate action against any of the others. Money paid by an attorney for costs which his client is adjudged to pay is a disbursement within 2 Geo. II. c. 23.‡

ASSUMPSIT on an attorney's bill, and for money paid, &c. Plea, the general issue.

An action having been brought on a policy of insurance which the defendant had subscribed, he desired the plaintiffs, Messrs. Crowder, Lavie, & Co. to do for him as for the other underwriters, and the sum of money now sought to be recovered was represented as his proportion of the law expenses which had been incurred in the course of that suit. No bill signed by the plaintiffs had been left with the defendant according to the provisions of stat. 2 Geo. II. c. 23, but a witness swore that when the demand was made upon the defendant, he was shewn a copy of the bill, the different charges were explained to him, and he said to his brother, to whom he left the management of the business, "Why do you not fill up a cheque for the money?" One part of the plaintiffs' demand, supposed to stand on peculiar grounds, was for the sum of 8*l.* which they had paid as

† *Collet v. Lord Keith*, 2 East, 260.

The supineness of the plaintiff in this case may be considered as a breach of an implied warranty on the part of the assured, to use reasonable care and diligence to guard

against all the risks covered by the policy. Vide *Law v. Hollingsworth*, 7 T. R. 160.

‡ See now 6 & 7 Vict. c. 73, s. 37.—B. C.

the defendant's proportion of certain costs awarded by the Court to the assured.

CROWDER
and Others
v.
SHEE.

Marryat, for the defendant, said he was instructed to rely upon the objection of no bill having been regularly delivered.

Garrow, on the other side, contended, that notwithstanding this omission, the whole sum demanded was recoverable; as the defendant had waived his right to have a bill left with him a month before the commencement of the action. He had been fully informed of the nature of the charges, and had in substance acknowledged that his proportion of them amounted to the sum he was required to pay. Thus he had enjoyed all the benefit of the Act of Parliament; and the truth was, that it would be a most oppressive practice to the underwriters themselves if a bill of costs and disbursements were made out for each of them; as they would be bound to pay for it, and the expense would often be far greater than the sum for which they had underwritten the policy. At any rate the 8*l.* was clearly recoverable as money paid to the defendant's use.

[438]

LORD ELLENBOROUGH :

If the objection is taken I must give it effect. The Act of Parliament is imperative. No attorney can commence an action until the expiration of one month after delivering to the party or parties to be charged a bill of his fees, charges and disbursements, signed with his proper hand. I don't think it necessary that such a bill should be delivered to each of the parties; and here if it can be shewn that a bill was regularly delivered to any one of the underwriters who were jointly liable, I shall repel the objection started on the part of the defendant. But if there was not, I think the plaintiffs cannot recover even for the 8*l.* I cannot separate that from the other items in the bill. I think the plaintiffs as to that were still acting as the defendant's *attornies, and that it must be considered as a disbursement in the cause.

[*439]

Plaintiffs nonsuited.†

† The intention of 2 Geo. II. c. 23, s. 23, is said to be to give the client due time to examine the charges made by the attorney and to take

1808.
Nov. 2.

VINCENT AND OTHERS v. HORLOCK AND OTHERS.

(1 Camp. 442—443.)

[442]

If A. the payee of a bill of exchange, endorses it in blank, and delivers it to B. and B. writes above A.'s endorsement "pay the contents to C." B. is not liable to C. as an indorser of the bill.†

THIS was an action brought pursuant to an order of the LORD CHANCELLOR, against the defendants as indorsers of a bill of exchange for 950*l.*, dated 25th February, 1793. The declaration stated the bill to have been drawn by one Jacks, payable to his own order, and to have been indorsed by him to the defendants, and by the defendants to the plaintiffs.

The fact was, that Jacks, the drawer and payee of the bill, indorsed it in blank to Horlock & Co., and that Caleb Jones, one of the partners in that house, wrote over Jacks's signature, "Pay the contents to Vincent & Co." without signing his own name or that of his firm.

Park, for the plaintiffs, contended that this was an indorsement by the defendants which rendered them liable on the bill. An indorsement was like an acceptance,‡ and did not require to be according to any set form. Any words written upon the bill which expressed the intention of the party to transfer it, were sufficient, without his name being subjoined. The suit out of which this action sprung, had been depending ten years in Chancery, during all which time it had never once been doubted in that *Court that this on the face of it was a valid indorsement by the defendants; and the LORD CHANCELLOR had sent the cause here for the investigation of a perfectly different question.

[*443]

LORD ELLENBOROUGH :

I am clearly of opinion that this is not an indorsement by the advice upon them, so that the bill should be left with him for that purpose. *Brooks v. Mason*, 1 H. Bl. 290. A distinction has been taken upon the point, whether an attorney may recover for disbursements not taxable, when part of his demand is for business done in Court, viz. that he may, where he has delivered no bill at all, Peak. Cas. 102; 2 Bos. & P. 345; but that where he has delivered a bill irregularly, he cannot, 6 T. B. 645; 2 Bos. & P. 343.

† B. of E. Act, 1882, ss. 23, 34 (4).

‡ Vide *Mason v. Rumsey*, 1 Camp. 385.

defendants. For such a purpose the name of the party must appear written with intent to indorse. We see these words "Pay the contents to such a one" written over a blank indorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted. When a bill is indorsed by the payee in blank, a power is given to the indorsee of specially appointing the payment to be made to a particular individual, and what he does in the exercise of this power is only *expressio eorum quæ tacite insunt*. This is a sufficient indorsement to the plaintiffs, but not by the defendants. The point could never have been presented to the attention of the Lord Chancellor.

VINCENT
and Others
v.
HORLOCK
and Others.

Plaintiffs nonsuited.†

COATES AND ANOTHER v. LEWES AND ANOTHER.

(1 Camp. 444—445.)

1808.
Nov. 2.

If the owner of goods allows the broker through whom he sells them, to sell them as a principal, the purchaser of goods so sold is discharged by payment to the broker in any way which would have been sufficient, had he been the real owner.‡

[444]

THIS was an action to recover the price of a quantity of linseed oil sold by the plaintiffs to the defendants,—who contended that they had already paid for it.

The witness to prove the sale, stated, that the oil was consigned to him by the plaintiffs from an outport to be sold in London; that he sold it to the defendants, to be paid for on delivery; that he appeared in the transaction as a principal; that he had formerly had goods consigned to him by the plaintiffs, who knew

† "In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself, the acceptor, the drawer, and the indorsers, are all liable in their turns; but they are only liable because they have written their names on the bill." Per BULLER, J. *Fenn v. Harrison*, 3 T. R. 761.

‡ Compare *Baring v. Corrie* (1818)

2 B. & Ald. 137. It is difficult to say that Lord ELLENBOROUGH's judgment is overruled, though one may suspect that the plaintiff received scant justice. But he was in the unfortunate position under the then rules of evidence, of being obliged to prove his case through a witness who, if not technically interested, can hardly have been indifferent.—R. C.

COATES
and Another
v.
LEWES
and Another.

that he always dealt in the same manner ; and that after the sale in question, but before the oil was delivered, he had received 500*l.* from the defendants on account of it for his own accommodation.

LORD ELLENBOROUGH :

A broker after having made the contract of sale cannot vary the terms of it to the disadvantage of his principal ; but in this case the person employed to sell, himself acted as a principal, and the plaintiffs knowing this, authorized his mode of dealing, and all its consequences.

It was then suggested that the defendants must have known he was not acting on his own account, as they knew him to be a sworn broker of the city of London. But

[445] Lord ELLENBOROUGH said a breach of his duties in that capacity could not affect the rights of third persons.

Plaintiff nonsuited.†

1808.
Nov. 4.

GOSLING *v.* HIGGINS.‡

(1 Camp. 451—452.)

[451]

If goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of Government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery, against the owner of the ship, who must seek his remedy over against the officers of Government.

THIS was an action for the non-delivery of 10 pipes of wine shipped at the island of Madeira, on board a vessel of which the defendant was owner, to be carried to Jamaica, and from thence to England.

When the vessel arrived off Jamaica, she was seized with her cargo for a supposed violation of the revenue laws, and there

† Vide *Waring v. Favenck*, *ante*, p. 638 ; *Kymer v. Suwercropp*, *ante*, p. 646 ; *Wiltshire v. Sims*, *ante*, p. 673.

‡ Similarly where the detention

was that of a foreign revenue authority. *Spence v. Chadwick* (1847) 10 Q. B. 517, 16 L. J. Q. B. 313.—
R. C.

condemned ; but upon an appeal to the Privy Council in England, the sentence of condemnation was reversed.

GOSLING
v.
HIGGINS.

Garrow, for the defendant, likened this to the case of an embargo, for which the ship-owner could not be liable. Here the goods could not be delivered, by reason of an act of Government ; and even supposing that the revenue officers committed a tort when they seized the ship's cargo, that must be considered as a tort between them and the owner of the wine, not between them and the defendant.

LORD ELLENBOROUGH :

You have an action against the officers. The shipper can only look to the owner or the master of the ship.

Verdict for the plaintiff.†

HURRY AND OTHERS v. MANGLES AND OTHERS.

(1 Camp. 452—453.)

1808.
Nov. 4.

[452]

If after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to a delivery of the goods to the purchaser, so as to put an end to the vendor's right of stopping them *in transitu*.

TROVER for a quantity of oil.

The defendants, who are warehousemen, on the 19th of April, 1806, sold the oil in question, then lying in their warehouses, to J. S. to be paid for by his acceptance at six months. J. S. having given his acceptance accordingly, on the first of August following, sold the oil to the plaintiffs, who purchased it *bonâ fide*, and paid for it at the rate agreed on.

The oil, which still remained in the defendants' possession, was demanded of them by the plaintiffs about the end of October ; when they said that J. S. had become insolvent before his acceptance was due, and that they would not deliver up the oil until they were paid for it. Their clerk now denied that they had ever transferred the oil in their books to the account of

† *Vide* Abbott on Shipping, part iii. ch. iv.

HURRY
and Others
v.
MANGLES
and Others.

J. S. ; but it appeared that they had received warehouse rent from him for its remaining in their warehouses after the period when it ought to have been taken away according to the terms of sale.

[453]

Pell, Serjeant, for the defendants, contended, that under these circumstances, they had a right to stop the goods *in transitu*.

LORD ELLENBOROUGH :

The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the seller to the buyer. If there was any conspiracy or contrivance on the part of the plaintiffs to cheat the defendants out of the price of the goods, proof of that will be an answer to this action ; but it would be overturning all principles to allow a man to say, after accepting warehouse rent, “the goods are still in my possession, and I will detain them till I am paid.” The *transitus* was at an end. The goods were transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and there deposited under lock and key.

Verdict for the plaintiffs.†

† Vide *Scott v. Pettit*, 7 R. R. 804 (3 Bos. & P. 469) ; *Smith v. Goss*, *ante*, p. 684 (1 Camp. 282).

BLACKENHAGEN v. THE LONDON ASSURANCE COMPANY.

(1 Camp. 454—456.)

1808.
Nov. 5.

[454]

If a ship with goods on board insured to a foreign port, learning in the course of her voyage that an embargo is there laid on all ships of her nation, waits at some place as near thereto as she safely can, till the embargo is removed, the goods will in the meantime be protected by the policy, while the voyage remains legal. But if she might, upon such an occasion, put into a friendly port adjoining to her port of destination, and instead of doing so, she sails back for her port of outfit, and is lost, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged.

THIS was an action of covenant on a policy of insurance on goods in the ship *William*, at and from London to Reval. The loss was laid in one count to be, by the perils of the sea; in another, by capture. Plea, *non infregit conventionem*.†

The ship sailed from the Nore on the 15th October, 1807, under convoy of the *Forrester* sloop of war, for the Sound, and arrived there on the 27th of the same month. On the 15th of November, she proceeded from thence towards Reval, under convoy of the *Garnet* sloop of war. Two days after, while they were proceeding on the voyage, the Captain of the *Garnet* received information, that an embargo was laid on all British ships in the ports of Russia. In consequence, he ordered the *William* to put back, and on the 18th she returned to Copenhagen roads. She afterwards lay off Gottenburgh six days, and might have entered that friendly port, if the master had thought fit. But on the 30th of November, she sailed with the fleet for England, under convoy of the *Garnet* and the *Spitfire* sloops of war.

The last time she was seen, was on the 3rd of December, in a heavy gale of wind, and not having been *heard of since, it was allowed that she had certainly perished on her voyage home.

[*455]

LORD ELLENBOROUGH :

This case will hardly bear to be stated. The underwriters were bound to indemnify the plaintiff for any loss that should happen on the voyage from London to Reval. If being unable

† 11 Geo. I. c. 30, s. 43.

BLACKEN-
HAGEN
v.
THE LONDON
ASSURANCE
COMPANY.

to get to Reval, the ship had lingered in that quarter, or had necessarily returned with an intention of ultimately completing the original voyage, a question of some nicety might have arisen. But by sailing back for England in the manner she did, the original voyage was abandoned, and the underwriters were discharged. The master might deem this the most advisable course he could pursue for the benefit of those he represented; but were the underwriters still to be liable on the policy, if it had been convenient for him to carry the ship to the Straits of Magellan? The case which I remember coming nearest this, was where a ship being prevented by the ice from reaching her port of destination, took shelter for the winter in a place as near to it as she could safely go, and prosecuted her voyage the ensuing season. Here, had the ship been coming home, as the best means of getting finally to Reval, and there had been a possibility of her being able to accomplish that object when the loss happened, she might still have been considered in the course of the voyage insured; but all thought of completing the original voyage seems to have been abandoned on the 30th of November, and there is no colour for charging the underwriters with a loss which happened subsequently to her setting sail for England.

Plaintiff nonsuited.†

[456]

† N. the plaintiff afterwards brought an action against the defendant on this policy, in the Court of C. P., which was tried at the sittings after last Michaelmas Term.

Sir JAMES MANSFIELD, as well as Lord ELLENBOROUGH, clearly thought, that the voyage was abandoned, by the ship sailing for England, instead of putting into Gottenburgh. The jury, nevertheless, found a verdict for the plaintiff: but in Hilary Term following, the Court of C. P.

set it aside, and ordered a new trial. Vide *Driscoll v. Bovil*, 1 Bos. & P. 313; *Hadkinson v. Robinson*, 7 R. B. 786 (3 Bos. & P. 388); *Hartley v. Buggin*, Park, 313 a; *Lubbock v. Rowcroft*, 8 R. B. 830 (5 Esp. Cas. 50).

The case was again tried in C. P. at the sittings after H. T. 1808, when Sir J. MANSFIELD, C. J. left it as a question of fact to the jury, whether the ship had abandoned the voyage insured or not, and the plaintiff obtained a verdict (1 Camp. 564).

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

GOODLAND *v.* BLEWITH.

(1 Camp. 477—478.)

A tender of money to an agent authorized to receive payment, is a good tender to the creditor himself.

1808.
Dec. 1.
At Westmin-
ster.

[477]

INDEBITATUS ASSUMPSIT for goods sold and delivered. Plea *non assumpsit* to all except 2*l.* 17*s.* and as to that a tender. Replication, that the plaintiff sued out a bill of Middlesex in this action on the 4th day of November last, and that no tender of the 2*l.* 17*s.* was made before that day. Rejoinder, that defendant tendered this sum before the suing out of the precept: whereupon issue was joined.

The goods in question had been delivered to the defendant by one West, the plaintiff's servant, who was authorised to receive payment for them; and there was evidence, that in the end of October *the defendant had offered to pay West the balance due, at the same time producing the money, which the latter refused to receive.

[*478]

Garrow insisted that this was not a good tender, and that the money ought to have been offered to the plaintiff himself. But

Per LORD ELLENBOROUGH:

A tender to an agent authorised to receive payment, is as good as a tender to the creditor in person.

The defendant had a verdict.†

The case was afterwards brought before the Court; but the direction of the CHIEF JUSTICE upon this point was acquiesced in.

† The demand of a debt, to do away the effect of a tender, must be by some one authorized to give the debtor a discharge.†

COLES *v.* BELL.
Sittings after M. T. 49 Geo. III.
(1 Camp. 478.)
Declaration for goods sold. Plea,

COLES
v.
BELL.
[478]

† But if the principal on being informed of the tender do not disclaim his agent's act in rejecting it,

he may be inferred to have authorized it. *Jackson v. Jacob* (1837) 5 Scott, 79, 3 Bing. N. C. 869.—B. C.

1808.
Dec. 2.

O'MEALEY v. WILSON AND ANOTHER.

(1 Camp. 482—484.)

[482]

If a British subject voluntarily resides in an enemy's country and carries on commerce there, he is disqualified, as an alien enemy, to sue in our courts of justice, although naturalized by a neutral State, and recognized as a citizen of that State both by its diplomatic agents and by the enemy's Government. And *semble*, that if a neutral voluntarily resides and carries on a commerce in an enemy's country, he is an alien enemy to all civil purposes.

SCIRE FACIAS against the defendants as the bail of one Newell.† Pleas, 1. That plaintiff long before and at the time of exhibiting his bill against Newell, was and now is an enemy of our Lord the King, inhabiting and dwelling within the realm and territory of France, and within the allegiance and under the government of the persons exercising the powers of Government there, and that a public and open war then was, and from thence continually hitherto has been and now is carried on and prosecuted by the said persons so exercising the powers of Government in France against our said Lord the King. 2. That plaintiff is a subject of France, and resides of his own free will and pleasure within the territory of France, and carries on trade and commerce as such subject there. 3. That plaintiff resides in France, and adheres to the persons exercising the powers of Government in that country.

It appeared that Mr. O'Mealey has resided in France for a considerable number of years; that he at present lives in Paris as an American citizen; that he is recognized as such by the American Ambassador there;‡ and that he is employed in tender. Replication, subsequent demand; and issue thereupon. The demand had been made by the clerk to the plaintiff's attorney, who had never seen the defendant before going upon this errand. Lord ELLENBOROUGH held the demand insufficient; as it ought to have been made by some person authorized to give the defendant a discharge. A demand by the attorney himself, his Lordship said, might have done.

The defendant had a verdict. Vide *Spybey v. Hide*, 1 Camp. 181.

† Vide *O'Mealey v. Newell*, 8 East, 364.

‡ The certificate of the American Ambassador at Paris, that the plaintiff is a citizen of the United States, was offered in evidence, but rejected. [The term "Ambassador" seems to be wrongly employed here. The United States maintained only legations, not embassies, until 1893. —F. P.]

presenting *American claims to the French Government; but that he had on several occasions talked of Ireland as his country, and of the Irish as his countrymen.

O'MEALEY
v.
WILSON
and Another.
[*483]

The *Attorney-General*, for the defendants, contended that under these circumstances the plaintiff must clearly be considered as an alien enemy.

Park, *contrà*, insisted that he was to be looked upon as an American citizen, who being a neutral might maintain an action in our courts, though living in an enemy's country.

LORD ELLENBOROUGH :

If a British subject resides in an enemy's country without being detained as a prisoner of war, he is precluded from suing here. Nor does it signify that he is recognised as a citizen by a neutral State. He cannot throw off his allegiance to his native sovereign. Therefore, if the plaintiff is an Irishman by birth, and now voluntarily resides and carries on trade in France, the defendants are entitled to a verdict on each of their three pleas. [His lordship likewise observed in the course of the trial, that if the plaintiff was domiciled in France, the place of his birth was immaterial; he must be considered as a subject of that State in which he resides and carries on commerce; and doing so in a country with which we were at war, to all civil purposes he was an enemy.†]

Park then proposed to be nonsuited.

[484]

The *Attorney-General* said he remembered no instance in which a nonsuit had been allowed in *scire facias*.

LORD ELLENBOROUGH :

I have no doubt that there may. At any period when the plaintiff is demandable, if he does not appear, there shall be

† Vide *M'Connell v. Hector*, 6 R. R. 724 (3 Bos. & P. 113); *Brandon v. Nesbitt*, 3 R. R. 109 (6 T. R. 23); *Casseres v. Bell*, 8 T. R. 166; *De Lunneville v. Phillips*, 2 Bos. & P. N. R. 96; *Kensington v. Inglis*, 9 R. R. 438 (8 East, 273); *Vanbrynen v. Wilson*, 9 East, 321.

O'MEARLEY
v.
WILSON
and Another.

judgment of nonsuit against him, unless there be something on the record inconsistent with such a judgment. Nothing of that sort appears in this case to prevent the plaintiff from abandoning his suit when he is called to hear the verdict.

Plaintiff nonsuited.

1808.
Dec. 8.

BAKER v. BOLTON AND OTHERS.†

(1 Camp. 493—494.)

[493]

In an action for negligence, whereby the plaintiff's wife was killed, he is not entitled to any damages for the loss of her society or assistance in business, or for his mental sufferings on her account, after the moment of her death.

THIS was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt, that she died about a month after in an hospital. The declaration, besides other special damage, stated, that "by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation and anguish of mind."

It appeared that the plaintiff was much attached to his deceased wife, and that being a publican, she had been of great use to him in conducting his business. But

LORD ELLENBOROUGH said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil court, the

† This case was a leading authority upon the law, as it existed previously to the Act 9 & 10 Vict. c. 93 (commonly known as Lord Campbell's Act). That Act gave a remedy in favour of a wife, husband, parent, or child of the deceased. The case is still an authority outside the Act; and was

followed in 1873 by the majority of the Court of Exchequer in the case of a master suing for damages in respect of an injury causing the death of his servant. *Osborn v. Gillett*, (1873) L. R. 8 Ex. 88, 42 L. J. Ex. 53.—R. C. See Preface.—F. P.

death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence.

BAKER
v.
BOLTON
and Others.

Verdict for the plaintiff, with 100l. damages.†

[494]

COVELL v. LAMING.

(1 Camp. 497—499.)

1808.
Dec. 10.

[497]

If the owner of a ship, being himself on board, and standing at the helm, unintentionally runs her against another ship, from unskilful management,—the remedy is trespass and not case.

TRESPASS for running defendant's ship against plaintiff's in the river Thames. Plea, not guilty.

It appeared, that when the accident happened, the defendant was himself on board of his ship, and stood at the helm; but there was evidence to shew, that he wished to steer clear of the plaintiff, and that if he was to blame for what had happened, it was only through ignorance and unskilfulness.

The *Attorney-General* contended, that the action could not be supported, unless the jury should believe that the defendant intended to run his vessel against the plaintiff's, and wilfully did the act complained of. It is a principle, that where trespass would lie against the servant, case will not lie against the master. The converse of the proposition is equally true, that where case would lie against the master, trespass will not lie against the servant. But if a servant, acting as captain of a ship, should, through negligence or ignorance, run her against another ship, the owner would be liable to an action on the case; therefore, this could not be trespass in the servant. And, to constitute a trespass, *according to no criterion that has ever been suggested, does it signify any thing, whether the party be a master or a servant. Thus it is wilfulness alone that can

[*498]

† Q. If the wife be killed on the spot, is this to be considered *damnum absque injuriâ*?†

† *Seemle*, that is so (apart from *Gillett*, cited in note on last page.—Lord Campbell's Act). *Osborn v. R. C.*

COVELL
v.
LAMING.

determine the nature of the act. The case of *Leame v. Bray*,† seemed to establish the distinction, that where the injury is immediate from a forcible act of the defendant, the remedy is trespass, and that case is never proper except where the injury is consequential; but the doctrine there laid down, had been since much doubted by the Court of Common Pleas.‡

LORD ELLENBOROUGH :

I know there is a difference of opinion upon this subject. I have had much communication concerning it with those whom I respect very highly; but I confess, I have not been able to perceive the grounds of their difficulties. My own opinion has always been uniform. Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant, I consider as the only just and intelligible criterion of trespass and case. If, in the dark, I ignorantly ride against another man on horseback, this is undoubtedly trespass, although I was not aware of his presence till we came into contact. It makes no difference that here the parties were sailing on ship board. The defendant was at the helm, and guided the motions of his vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, *and the injury which the plaintiff sustained was the immediate effect of that force.

[*499]

The plaintiff had a verdict.§

† 3 East, 593. [See Preface to 7 R. R. vii.]

‡ *Rogers v. Imbleton*, 2 Bos. & P. (N. R.) 119.

§ In *Huggett v. Montgomery*, 2 Bos. & P. N. R. 446, the Court of C. P. held, that if a ship, while the owner is on board, runs against another, by the negligence of the pilot, trespass will not lie, and the only remedy is an action on the case. They laid considerable stress upon the circumstance

that the defendant, though on board, had not the direction of the vessel when the accident happened, which distinguished the case from *Leame v. Bray*; but they again questioned the authority of that decision. Vide *Day v. Edwards*, 5 T. R. 648; *Savignac v. Roome*, 6 T. R. 125; *Ogle v. Barnes*, 4 R. R. 630 (8 T. R. 188); *M'Manus v. Cricket*, 5 R. R. 518 (1 East, 106); *Morley v. Gaisford*, 3 R. R. 432 (2 H. Bl. 442).||

|| And see note (by the reporter) to *Morley v. Gaisford*, 3 R. R. 432 (2

H. Bl. 441), and note in 4 R. R. 632, at the end of *Ogle v. Barnes*.—R. C.

ISRAEL v. ISRAEL.

(1 Camp. 499—500.)

1808.
Dec. 9.

[499]

A written paper containing a bare acknowledgment of a debt, is good evidence under the money counts, without a stamp.†

ASSUMPSIT for money lent, and an account stated. Plea, the general issue.

It appeared, that in July last, a settlement of accounts took place between the parties, when the defendant, *who is son to the plaintiff, gave him an unstamped slip of paper, with the following words written upon it in his own hand :—" I owe my father four hundred and seventy pounds. JAS. ISRAEL." This was now offered in evidence as proof of a debt to that amount.

[*500]

The *Attorney-General* objected, that it was to be considered either as a promissory note, or a receipt, and that in neither case was it receivable without a stamp.

Garrow and *Lawes*, on the other side, contended that it was merely an acknowledgment by the defendant, that upon a settlement of accounts, such a balance was due to the plaintiff; and they cited the case of *Fisher v. Leslie*, 1 Esp. N. P. Cas. 426, in which it had been held by EYRE, C. J., that an I. O. U. was good evidence under the money counts, without a stamp.

LORD ELLENBOROUGH :

I entertained some doubts whether this paper ought not to have been stamped as a promissory note; but upon the authority of that case, I will receive it in evidence though unstamped.

The plaintiff had a verdict.‡

† But it is now to be considered whether the document is a receipt within the existing Stamp Act (1891) 54 & 55 Vict. c. 39, s. 101.—R. C.

‡ In *Grey v. Harris*, C. P. Sittings after E. T. 1800, Lord ELDON,

C. J., is said to have held, that an I. O. U. could not be received in evidence without a stamp, being a promissory note, though not negotiable. Chitty on Bills, 2nd ed. 243, *in notis*.

1808.
Dec. 16.

VALLANCE v. DEWAR.†

(1 Camp. 503—508.)

[503]

According to the usage of the Newfoundland trade, when ships arrive on the coast they are either employed for some time in fishing (called banking) or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy. Therefore, in effecting a policy, "lost or not lost at and from Newfoundland to a port in Europe," although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates. If the usage is general, it makes no difference for this purpose, that it is not uniform.

THIS was an action on a policy of insurance on the ship *Courier*, and her freight and cargo, "lost or not lost, at and from any port or ports in Newfoundland to one port of discharge in Portugal, or to any port or ports in the United Kingdom."

[*504]

The policy was effected on the 28th of August, 1807. The *Courier* arrived at Newfoundland in June, and was employed till the 13th of October in banking, *or fishing on the banks of that coast. She then began to take in her homeward bound cargo, and she sailed for England the 22nd of December, but soon after foundered in a gale of wind.

The defence was, that the underwriters had not been informed that the ship was to be employed in banking while at Newfoundland; and that by the banking their risk was greatly increased, as the policy being "lost or not lost, at and from," attached immediately upon the ship's arrival at Newfoundland; and even if it did not, from the delay occasioned by the banking, the voyage home was turned from a summer into a winter one.

† See observation of TINDAL, C. J., in *Mount v. Larkins* (1831) 8 Bing. 108, 121, to the effect that the above decision is rested wholly on the usage affording the presumption of notice to the underwriters. And this

observation again referred to by BLACKBURN, J., in *De Wolf v. Archangel, &c.* (1874) L. R. 9 Q. B. 451, 456, 43 L. J. Q. B. 147, 39 L. T. 605.—R. C.

The *Attorney-General*, for the plaintiff, said he should give a complete answer to this defence by shewing, that according to the established usage of the Newfoundland trade, ships after their arrival upon the coast are either employed in banking, or take an intermediate voyage to Quebec or some of the adjacent settlements, before they begin to take in their homeward cargo, and that during the banking or intermediate voyage they are covered by a separate and distinct policy. Of this as of every other usage of trade, the underwriters were bound to take notice. Thus in *Noble v. Kennoway*, Doug. 510, where the policy was on goods on board two ships from this country to Labrador, until the goods should be there discharged and safely landed, and the ships upon their arrival, instead of unloading their cargoes, were employed in fishing for nearly two months after, at the end of which time they were captured by an American *privateer with the goods on board, it was held that the underwriters were liable, the usage in this trade being for ships to unload their cargoes (consisting chiefly of salt and provisions), gradually as they are wanted for curing the fish, and for consumption. Lord MANSFIELD there said, "every underwriter is presumed to be acquainted with the practice of the trade he insures, and if he does not know it, he ought to inform himself." The same doctrine had been laid down by Lord ELDON, while C. J. of the Common Pleas, in a case which still more nearly resembles the present.†

VALLANCE
v.
DEWAR.

[*505]

† OUGIER v. JENNINGS.

C. P. Sittings at Guildhall after E. T.
1800.

(1 Camp. 505, n.)

Action on a policy of insurance on fish by the ship *Duchess of Gordon*, at and from Newfoundland to a port in Portugal. The ship carried out a cargo of salt from Lisbon, with which she arrived at Newfoundland on the 21st July. As soon as she was unloaded she proceeded in ballast to Sidney, where she arrived on the 25th August, and took in a cargo of coals. This she carried back to Newfoundland, and delivered there in the beginning of October. Be-

tween the 21st of that month and the 8th of November, she was loaded with the cargo of fish, which was the subject of the insurance, and soon after sailed with convoy for Oporto, but was totally lost in the course of the voyage. The defence was, that the trip to Sidney had not been communicated to the underwriters, although a material circumstance, as tending to retard the voyage insured, and to increase the risk. The plaintiff relied upon the usage of the trade, which was proved by several witnesses.

Cor. LORD
ELDON, C. J.

LORD ELDON:

The policy is "at and from New

VALLANCE
v.
DEWAR.
[*506]

*Therefore if the usage was established, it followed that there was no occasion on the part of the assured to make any disclosure concerning the banking, and that the loss having happened on the homeward bound voyage, there could be no defence to the action.

Several witnesses long acquainted with the Newfoundland trade were called, who proved the usage to be as above stated, and that a policy of this sort was understood to attach when the ship begins to take in her homeward bound cargo. They added that fish of a former season were sometimes found ready cured upon the arrival of the ships at Newfoundland, so that a cargo might be immediately procured.

[507]

Park still contended that the policy attached immediately upon the termination of the outward bound voyage. This must be understood to be the intention of the parties from the words lost or not lost standing in the policy, although it was effected

OUGIER
v.
JENNINGS.

foundland to Portugal, upon goods, beginning the adventure from the loading thereof." It is not from the arrival of the ship, but from her beginning to load. I think the practice of the trade in this case is as capable of being received in evidence as the practice in other cases in which it has been admitted. This is like the case of the ship that was employed on the Labrador coast, where she fished after *her arrival and before her outward cargo was discharged.† There is no doubt that the policy *prima facie* means the first cargo which shall be laden after the ship's arrival, but the underwriter must refer himself to the usage of the trade, which he is bound to know. The first question will be, whether there is such an usage here? If the evidence leads to this, that the ship may make an intermediate voyage of

[*506, n.]

several years, it is too dangerous for you to give it effect. If several ships belonging to a merchant arrive together at Newfoundland, and finding cargoes for some only, he *bond fide* sends the rest on an intermediate voyage, it seems reasonable; though studiously sending a ship on an intermediate voyage out of her turn would be a deviation. The second question is whether this ship has been employed otherwise than the usage warrants? If you think the usage does exist, if you think it reasonable, and if you think this ship acted *bond fide* in taking the intermediate voyage, you will find for the plaintiff,—if not, you will find for the defendant.

The jury found a verdict for the plaintiff, and no attempt was made to set it aside.

† *Noble v. Kennoway*, Doug. 510.

on the 28th of August. The case of *Noble v. Kennoway* was in point to shew that the policy on the outward and that on the homeward voyage were understood to cover all risks on these adventures from the sailing of the ships from England till their final return ; and in *Ougier v. Jennings*, the insurance being on fish only, the moment when the policy attached was necessarily ascertained to be from the beginning to load. A policy upon a ship at and from a place must attach, upon her first being moored there in good safety. Usage could not control words so explicit. But the usage set up did not appear uniform, which it must be to have the effect ascribed to it ; for as often as a ship could procure a cargo upon her arrival at Newfoundland, there could be no doubt that she would prefer returning direct to Europe, instead of taking an intermediate trip in America. The underwriters, therefore, had reason to suppose their risk would commence in June ; and as the ship was employed in banking till October she had been guilty of a deviation, and they were discharged from all responsibility.

VALLANCE
v.
DEWAR.

LORD ELLENBOROUGH :

The rule is, that the broker must communicate what is in the special knowledge of the assured, not what is in the middle between them and the underwriters. He is not bound to make a laborious disclosure of what is known to all. Is it notorious, then, that ships in this trade, upon their *arrival at Newfoundland are either employed in banking, or take an intermediate voyage ? If so, it must be presumed to be equally in the knowledge of both parties. According to the general import of the words " at and from," the policy would attach upon the ship's first mooring in a harbour on the coast ; but it doubtless may be explained differently by usage ; and as between these parties, the policy must be taken to be the same as if it had been expressed to attach upon the expiration of the banking or intermediate voyage. The underwriters were not liable for any antecedent loss, and cannot complain of what was previously done as a deviation. Although there should be exceptions as to the usage, that would be immaterial. Things are presumed to go on in their ordinary course ; and if an usage

[*508]

VALLANCE
v.
DEWAR. be general, though not uniform, the underwriters are bound to take notice of it.

Verdict for the plaintiff.†

1808.
Dec. 17.

PHILLIMORE AND OTHERS v. BARRY AND ANOTHER.

(1 Camp. 513—515.)

[513]

Where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognized the purchase. Held, that the entry in the catalogue, and the letter, coupled together, were a sufficient memorandum of the contract within the Statute of Frauds. If goods are sold, to be paid for in thirty days, and if not carried away at the end of that time, warehouse rent to be paid for them,—the property in the goods vests absolutely in the purchaser, and they remain at his risk, from the moment of the sale.

THIS was an action for goods sold, to recover the price of 13 puncheons of rum.

The cargo of a Danish prize, of which the rum in question formed a part, was lodged in the warehouses of Messrs. Fector & Minet at Dover, and was sold by auction in various lots, on the 28th of April, 1808. By the conditions of sale, a deposit of 25 per cent. was to be paid immediately, and the remainder of the purchase money in 30 days. At the end of that time, the purchasers were to carry away the goods, or were afterwards to pay warehouse rent. Before the day of sale, the defendants had

† KINGSTON v. KNIBBS.

Sittings after M. T. 49 Geo. III.

(1 Camp. 508, n.)

Action on policy on ship, at and from Oporto to London. The ship having taken in a part of her cargo within the bar of Oporto, went outside to take in the remainder, when she was driven out to sea in a gale of wind and captured. The defence was, that the underwriters had not been informed she was *to take in any part of her cargo outside the bar. But several witnesses stated, that it is usual for vessels to do so

at Oporto, when, from the state of the river, they cannot conveniently load entirely within the bar. And though it appeared that in policies "at and from Oporto," liberty is sometimes expressly given to load on either side the bar;—Lord ELLENBOROUGH held, that the underwriters were bound, of themselves, to take notice of the usage; and the plaintiff had a verdict.

Vide *Pelly v. Royal Ex. Ass.*, 1 Burr. 341; *Tierney v. Etherington*, ib. 348; *Lyons v. Bridge*, Doug. 512; *Hoskins v. Pickersgill*, Marsh. 727.

[*509, n.]

written to Messrs. Fector & Minet to buy 13 puncheons of this prize rum for them. Accordingly Mr. John Minet Fector, one of that firm, bid for several lots, which were knocked down to him, and amounted to the quantity required. The auctioneer, opposite to each of these lots, wrote down in his printed catalogue the price for which they sold, and the initials I. M. F., meaning, John Minet Fector. On the 11th of May, the defendants wrote a letter to Messrs. Fector & Minet, recognizing and approving of this purchase. But on the 18th of the same month, the warehouses in which the rum was, accidentally caught fire, and by means of a quantity of gunpowder lodged in them, were blown into the air *with a tremendous explosion. There was no evidence of the deposit being paid.

PHILLIMORE
and Others
v.
BARRY
and Another.

[*514]

Garrow, for the defendants, stated two grounds on which, he contended, his clients were not liable. 1. The contract was void under the Statute of Frauds. The only way in which it could be pretended the 17th section had been satisfied was, by a memorandum in writing. But it would be difficult to say, that under the circumstances of this case, the auctioneer was the authorized agent of the defendants; and even if he were, writing the letters I. M. F. in the printed catalogue could not be considered as any memorandum of the contract between the parties. 2. Until the expiration of the 30 days, the goods remained at the risk of the sellers. They were not to be paid for or delivered before then, and the property did not absolutely vest in the purchaser. The stipulation as to the paying of warehouse rent afterwards, shewed, that till that time the goods were still considered as belonging to the vendors, subject to the right of the purchaser upon fulfilling his part of the contract. But

Lord ELLENBOROUGH held, that the initials of the defendants' agent written by the auctioneer in the catalogue, coupled with their letter recognizing the sale, constituted a sufficient memorandum in writing to satisfy the Statute of Frauds;† and that

† *Suunderson v. Jackson*, 5 R. R. *Champion v. Plummer*, 8 R. R. 765
580 (2 Bos. & P. 238); *Egerton v.* (1 Bos. & P. (N. R.) 252).
Matthews, 8 R. R. 489 (6 East, 307);

PHILLIMORE
and Others
v.

BARRY.
and Another.

[*515]

the property *vested absolutely in the purchasers from the moment of the sale, the agreement to give stowage room to the goods free of expense for 80 days, being introduced for their benefit, and being part of the consideration for which the purchase money was to be paid.†

Verdict for the plaintiffs.

1808.
Dec. 23.

THOMPSON v. HAVELOCK.‡

(1 Camp. 527—529.)

[527]

If A. while employed as master of a ship, of which B. is the owner, gives part of his personal services to C. for a stipulated sum, and C. pays this into the hands of B., an action to recover it cannot be supported against B. at the suit of A.

THIS was an action for money had and received.

In April, 1800, the plaintiff was at Smyrna as captain of the ship *Lord Nelson*, of which the defendant was owner. There he entered into an agreement with the deputy commissary of the English army in Egypt, to let the ship to Government for six months. Having stipulated that his owner should have 40s. per ton per month, he required that he himself should be allowed the usual primage. The commissary refused to make any allowance by way of primage, the freight being so very high; but, as he expected great assistance from the plaintiff's skill and activity in managing the transport service in that quarter, he agreed, that instead of primage, Captain Thompson, for his personal exertions in the public service, should be allowed 1s. per ton per month upon the tonnage of the *Lord Nelson*. *The plaintiff and the ship remained in the Mediterranean under this contract about nine months; and the defendant afterwards received from Government the money which they had thus earned. The question was, whether the plaintiff as captain, or the defendant as owner of the ship, was entitled to the 1s. per ton per month. On the part of the plaintiff it was proved, that by the usage of the

[*528]

† *Hanson v. Meyer*, 8 R. R. 573 (6 East, 614); *Hinde v. Whitehouse*, 8 R. R. 676 (7 East, 558).

‡ Followed in *Morrison v. Thompson* (1874) L. R. 9 Q. B. 480, 43

L. J. Q. B. 215, 30 L. T. 869; compare, however, *Lister & Co. v. Stubbs* (C. A. 1890) 45 Ch. D. 1; 59 L. J. Ch. 570; 63 L. T. 75.—R. C.

Mediterranean trade, if he had brought home a cargo of merchandize from Smyrna (which he was about to do when he entered into the service of Government), he would have been entitled to a primage of 5*l.* per cent. upon the freight, and that while he continued in the service of Government, his personal exertions, independently of the ship, were of considerable benefit to the public.

THOMPSON
v.
HAVELOCK.

LORD ELLENBOROUGH :

Is it contended that a servant, who has engaged to devote the whole of his time and attention to my concerns, may hire out his services, or a part of them, to another ? It would have been a different thing, if the owner had been suing for this money ; but I am clearly of opinion, that at all events the present plaintiff has no right to it. Under this contract, he must have been taken from superintending the defendant's ship ; and I don't know how far it might go, if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty. I will assume, that the plaintiff obtained as high a freight as possible for his owners, and that his services to Government were meritorious : still there would be no security in any department of life or of business, if servants could legally *let themselves out in whole or in part. My opinion upon the subject is quite decisive ; and if it be doubted, I beg that a bill of exceptions may be tendered.

[*529]

The plaintiff's counsel acquiesced in this decision ; and upon the recommendation of the CHIEF JUSTICE, it was agreed that the defendant should make the plaintiff an allowance for primage.†

† See a very learned note of Mr. Hargrave upon the villenage maxim, "*quicquid acquiritur servo acquiritur domino*," in which he states it as his opinion, that a master cannot maintain an action for the earnings of his servants (although he may for those of his apprentice) where the service has been without his privity, as "the master's proper remedy in

all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action, either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract," Co. Lit. 117*a* (1). But the master may retain the earnings of his servant when once paid into his hands,

1808.
Dec. 30.

KNOX v. WOOD.†

(1 Camp. 543—546.)

[543]

A. residing in Dublin having agreed with B. and C. at Jamaica to send out two ships annually, for which they were to provide cargoes to be consigned to him, chartered a ship which was to proceed from Bristol to St. Thomas's, where she was to deliver an outward cargo (the property of another person), and from thence to Jamaica, where she was to take in a cargo from B. and C. for Dublin; and by the terms of the charterparty A., in consideration of guaranteeing the homeward cargo, was to receive a commission of $2\frac{1}{2}$ per cent. upon the homeward freight. The ship was captured on her passage from St. Thomas's to Jamaica. Held, that A. had not then an insurable interest either in the commission on the freight, or in the commission on the sale of the homeward cargo.

[*544]

THIS was an action on a policy of insurance upon the *Friendship*, at and from Bristol to St. Thomas's and Jamaica, and from thence back to Dublin. The insurance was stated to be on "commissions valued at 1,000*l.* without average, and without benefit of salvage." The declaration, after averring that the plaintiff was interested in the said voyage and commissions in manner and form thereafter more particularly mentioned, set out a charterparty of affreightment between the plaintiff and the owner of the *Friendship*; whereby it was agreed that she should carry out a cargo (the property of another person) which she then had on board to St. Thomas's; that having landed it, she should proceed to Jamaica, and there take in a cargo of colonial produce for Dublin; that the owner should receive *freight at the current rate; and that the freighter should be entitled to a commission of two and a-half per cent. on the amount of this freight for the guarantee of the cargo. The declaration afterwards stated, that the ship was captured on her way from St. Thomas's to Jamaica; "whereby the said voyage was wholly defeated, and plaintiff was prevented and hindered from shipping and bringing the said cargo from Jamaica to Dublin in the said ship, and wholly lost his said commissions and interest in the

as he is equitably entitled to them; and his right can least of all be controverted by the servant. *Barber v. Dennis*, 6 Mod. 69; *Anon.*, 12 Mod. 415; *Trenwell v. Middleton*, Cro. Jac.

653, 15 Vin. Abr. Master and Servant (O. 2).

† See S. C. noted at length in Park's Ins. p. 564 (ed. 1842).—R. C.

said cargo, and all benefit and advantage to be derived from the completion of the said voyage.”

KNOX
v.
WOOD.

The *Attorney-General*, in opening the case, stated that the plaintiff who now resides in Dublin, having been at Jamaica in 1806, entered into an agreement with a house there, that he should send out two ships annually, for which they were to provide cargoes to be consigned to him at Dublin. In consequence, the ship in question was freighted in the manner stated in the declaration. She discharged her outward bound cargo at St. Thomas's, and sailed for Jamaica, but was captured and carried into Cuba. There, by an illegal act, which could not prejudice the plaintiff, the captain ransomed her and proceeded on his voyage. The ship upon her arrival at Jamaica was seized by the Vice-admiralty Court, and was not released till the season was lost, and it had been found necessary to send the cargo which had been provided for her by another vessel. *Mr. Attorney-General* contended that the plaintiff had a direct interest which was the subject of insurance in the voyage that had thus been lost. Had the ship arrived at Dublin, *he would have received both a commission upon the freight and a commission upon the sale of the cargo; and why should he not be allowed an indemnity against the loss of these advantages, which in that event would certainly have accrued to him? Nor did it make any difference that the ship was taken before she arrived at Jamaica, this case being exactly like some that had been lately decided, in which it was held that where there was an insurance on freight, the assured might recover if the ship was going to her loading port for the express purpose of taking in a cargo when the loss happened.† By a particular contract there may be an interest created both in freight and commission, before the goods are put on board, and by reason of the charterparty in this case, the plaintiff had an insurable interest when the ship sailed from St. Thomas's for Jamaica.

[*545]

† *Thompson v. Taylor*, 3 R. R. 233 8 R. R. 649 (7 East, 400). Sed vide (6 T. R. 478); *Horncastle v. Stuart*, *Forbes v. Cowie*, 1 Camp. 520.†

† The question on that policy is *v. Aspinall* (1811) 13 East, 323, to be more carefully considered in *Forbes* reported in R. R. *in loco*.—R. C.

KNOX
v.
WOOD.

LORD ELLENBOROUGH :

It strikes me that this was a mere expectation. The plaintiff had an interest in the ship from St. Thomas's, only in the expectation of a cargo. The expectation is frustrated by the capture, and the interest was never on board. This is an insurance of an expectation of an expectation. If you think there is anything sperate in it, I will save the point. I am perfectly satisfied myself that the plaintiff cannot recover upon this policy.—To decide otherwise would be to repeal the statute.

Verdict for the defendant.

In the ensuing Term the *Attorney-General* did move for a new trial: but the COURT were clearly of opinion that the plaintiff had not an insurable interest when the loss happened. Lord ELLENBOROUGH said, This case carries us into the land of dreams, and if supported, would introduce the practice of insuring a 20,000*l.* prize in the lottery without purchasing a ticket!

Rule nisi refused.†

† Had goods consigned to the plaintiff been actually on board, when the loss happened, according to an opinion thrown out by Lord KENYON, he would have had an insurable interest in his commissions as consignee. *Flint v. Le Mesurier*, Park, 268, n. So the commissions and privileges of

the captain of a ship may be insured. *King v. Glover*, 9 R. R. 638 (2 Bos. & P. (N. R.) 206). Vide *Grant v. Parkinson*, Park, 267; *Barclay v. Cousins*, 6 R. R. 505 (2 East, 544); *Lucena v. Crawford*, 6 R. R. 623 (3 Bos. & P. 75; 2 Bos. & P. (N. R.) 269, S. C.).

K. B. (AT NISI PRIUS) EASTER TERM.

THE DUKE OF NORFOLK *v.* WORTHY.

(1 Camp. 337—342.)

1808.
*June 2.**At West-*
minster.
[337]

A. as the agent of B. the owner of a landed estate, enters into an agreement for the sale of it with C., who appears to act on his own account, but in fact is the agent of D., and A. and C. bind themselves in a penalty for the performance of the agreement, whereupon C. pays A. part of the purchase-money as a deposit. Held that upon a breach of the conditions of sale on the part of the vendor, an action for money had and received lies at the suit of D. against B. to recover back the deposit, without proof of the money being paid over by A. to B.†

ACTION for money had and received, to recover back a deposit upon the sale of an estate. Plea, the general issue.

[The sale was to have taken place by auction on the 21st of December last, but on the 15th of the same month a written agreement was entered into between J. Richardson on the behalf of the defendant, and J. Harting who then appeared as a principal, but was in fact the agent of the plaintiff, whereby the defendant was to convey the premises to Harting on or before the 20th of January following, for 1,575*l.* to be paid to Richardson on the execution of the conveyance; and for the true performance of the agreement Richardson and Harting bound themselves to each other in the penalty of 500*l.* A deposit was then paid by Harting (out of the plaintiff's money) to Richardson of 300 guineas.

Ultimately the plaintiff declined to complete the purchase on the ground of a misdescription in the particular.

The misdescription in fact having been proved, the plaintiff's counsel contended that the deposit was recoverable as money had and received.

Pell, Serjeant, for the defendant, objected, *inter alia*, that] as there was evidence of only a part of the deposit being paid over [339]

† The case is cited by BOWEN, L. J. in *Ellis v. Goulton*, '93, 1 Q. B. 350, 353, 62 L. J. Q. B. 232, 235, as an early authority for the proposition

that the solicitor of the vendor, is unless the contrary has been agreed on, the agent of the vendor to receive a deposit on his behalf.—R. C.

THE DUKE
OF NORFOLK
v.
WORTHY.

to Worthy, the action would not lie against him, but ought to have been brought against Richardson. And he relied upon *Burrough v. Skinner*, 5 Burr. 2639, where it was held, that the auctioneer is liable for the deposit where the bidder has sufficient reason not to proceed.

LORD ELLENBOROUGH :

If proof were necessary that the money had been paid over to the defendant the evidence given would be insufficient. The deposit is not to be split into portions, and Richardson would still be considered as the depository. But it seems to make no difference, whether it was actually paid over or not. Richardson here acted completely as the agent of the defendant. Therefore when the deposit was lodged with the agent, this was in law *eo instanti* a payment to the principal.

* * * * *

[340]

The plaintiff had a verdict.†

[*341]

In the ensuing Term *Pell*, Serjeant, moved for a new trial in this case, both on the ground that the action should have been brought in the name of Harting, and that it should have been brought against *Richardson; but the Judges were all of opinion, that the deposit was to be considered the money of the Duke of Norfolk, and that being paid to the agent of the defendant it was money had and received by the latter to the plaintiff's use.

They therefore refused a rule to shew cause.

† The question on the merits was whether the misdescription was such as to avoid the sale, notwithstanding a condition that misdescription should be matter of compensation. As to this see the more considered judgment of the Court of Common Pleas in *Flight v. Booth* (1834) 1

Bing. N. C. 370, cited by STIRLING, J. in *In re Davis and Cavey* (1888) 40 Ch. D. 601, 608, 58 L. J. Ch. 143, 60 L. T. 100, and approved by every member of the Court of Appeal in *Re Fawcett and Holmes* (1889) 42 Ch. Div. 150.—R. C.

INDEX.

ACCOUNT STATED. *See Toll.*

AFFIDAVIT—Irrelevant allegations.—Allegations, material to an issue, are not impertinent; and, if relevant and pertinent, are not in any case scandalous. Scandalous matter, as allegations reflecting upon moral character, and not relevant to the subject, will be expunged from the record, whether in a suit or bankruptcy, and without an application. *Ex parte Simpson* 104

ANIMALS—1. Cattle straying on unfenced land.—If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other. *Churchill v. Evans* 600

— 2. Justification for shooting dog in defence of property.—If defendant justifies shooting a dog, because the dog was worrying his fowl, and could not otherwise be prevented, he must prove that the dog was in the act of worrying the fowl at the very moment he shot him. *Janson v. Brown* 626

— 3. Replevin.—An action on the case will not lie for detaining cattle distrained and impounded, where a tender of amends was not made till after the impounding. *Ancomb v. Shore* 686

— 4. Warranty of horse—Measure of damages.—Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him. If the horse is not returned, the measure of damages is the difference between his real value and the price given. *Caswell v. Coare* 606

APPROVEMENT. *See Common.*

ARBITRATION—Objection to umpire.—Arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority. The defendant having objected to this appointment, because of partiality, the arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attorneys agreed on a third person. In consequence the umpire objected to was then called on by the plaintiff's attorney to proceed, and made his award within time. Held, that the award was good. *Oliver v. Collings* 325

BAILMENT. *See Negligence.*

BANKRUPTCY—1. Composition—Secret agreement.—Upon a composition a private agreement by some creditors for additional security, though for no greater sum, void. Creditors are bound by acting under a composition, as if they had signed. *Ex parte Sadler and Jackson* 18

BANKRUPTCY—2. **Preferential claim**—**Friendly Society**.—The preference given to friendly societies by the stat. 33 Geo. III. c. 54, s. 10 over other creditors, is confined to debts in respect of money in the hands of their officers by virtue of their offices and independent of contract: therefore does not extend to money held by the treasurer upon the security of his promissory note, payable with interest upon demand. *Ex parte Stamford Friendly Society* 78

— 3. **Undue preference**.—A trader in contemplation of bankruptcy, and without solicitation, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter; but before they were delivered, the creditor called upon the trader, and demanded payment of his debt. Held, that the intention to give a voluntary preference not being consummated, this was a valid payment. *Bayley v. Ballard* . . . 714
And see Ship.

BASTARDY—Evidence of mother, as to. *See Evidence*, 8.

BILL OF EXCHANGE—1. **Discharge of drawer and acceptor**—**Corrupt agreement**.—An agreement of the payee of a bill of exchange to discharge a person liable upon it, in consideration that the latter would not move the Court of K. B. against him for a misdemeanor is illegal and corrupt. *Pool v. Bousfield* 633

— 2. **Forged bill**.—If A. the indorsee for value of a bill of exchange, to which B. the indorser had forged the acceptance of D. delivers it up to B. on his solicitation, and receives from him, in lieu thereof, a bill accepted by D. without consideration, A. may maintain an action on this bill against D. unless there was an agreement between him and B. to stifle a prosecution for forgery. *Wallace v. Hardacre* 629

— 3. **Illegal consideration**.—In an action by the second indorsee against the acceptor of a bill of exchange, if the person who indorsed it to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due. *Chalmers v. Lanion* 709

— 4. **Notice of dishonour**.—Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer and of the insolvency of the acceptor, before and at the time when the bill became due; and within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders communicated such their knowledge to the bankers in Liverpool, with whom they had before discounted the bill, and who had transmitted it to the holders in London; yet that did not dispense with such holders' giving notice of the dishonour in due time to the indorsers. *Esdaile v. Sowerby* 440

— 5. — In an action against the drawers of a bill of exchange, drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn; and in such action it is unnecessary to prove that the drawers had notice of the bill being dishonoured. *Porthouse v. Parker* 637

— 6. **Parol discharge**.—The holder of a bill of exchange may discharge the liability of the acceptor by parol; but for this purpose, the words must amount to an absolute renunciation of all claim upon him in respect to the bill. *Whalley v. Tricker* 623

— 7. **Property in**—**Deposit by insolvent holder**.—A trader, receiving bills of exchange from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming insolvent, but before committing an act of bankruptcy, delivers these bills, with the consent of his other creditors, to an agent of the person who had remitted them, for the use of the latter.

This is a valid transaction, and if a commission of bankrupt afterwards issues against the trader, his assignees cannot recover the produce of the bills from the trustees. *Graff v. Greffulhe* 640

BILL OF EXCHANGE—8. Re-exchange.—A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from London on Lisbon, upon evidence that owing to hostilities there was in fact no direct exchange between Lisbon and London, the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between Lisbon and London at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country. *De Tastet v. Baring* 499

— 9. **Special endorsement.**—If A. the payee of a bill of exchange, endorses it in blank, and delivers it to B. and B. writes above A.'s endorsement "pay the contents to C." B. is not liable to C. as an indorser of the bill. *Vincent v. Horlock* 724

BOND—1. Presumption of payment.—To raise the presumption that a bond has been satisfied, there must be a lapse of the full period of twenty years from its becoming forfeited; unless there be some additional circumstance, as an intermediate settlement of accounts between the parties. *Coleell v. Budd* 621

— 2. **Of married woman.** See **Married Woman**, 2.

COLLISION, at sea. See **Trespass**, 1.

COMMON—Right of.—There can be no approvement in derogation of a right of common of turbary.

At common law the lord might approve against common of pasture appendant. *Grant v. Gunner* 562

CONSPIRACY. See **Criminal Law**, 1.

CONTRACT—1. Against public policy.—If articles of dress are sold to a woman of the town, an action will lie to recover their value, although the seller knew the way of life of the purchaser; unless he furnished them with a view to enable her to carry it on, and he expected to be paid from the profits of her prostitution. *Bowry v. Bennet* 697

— 2. **For expenses of prosecution.** See **Criminal Law**, 2.

— 3. **Measure of damages in quantum meruit.**—Where the plaintiff declares on a *quantum meruit* for work and labour done and materials found, the defendant may reduce the damages by shewing that the work was improperly done; and may entitle himself to a verdict by shewing that it was wholly inadequate to answer the purpose intended. *Farnsworth v. Garrard* 624

COPYHOLD—1. Court rolls—Right to inspect.—One who has a *primâ facie* title to copyhold is entitled to inspect the Court-rolls and take copies of them, so far as relates to the copyhold claimed. *R. v. Lucas* :83

— 2. **Estoppel.**—Devises of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe d. Blacksell v. Tomkins* 467

— 3. **Evidence of custom of manor.**—Entries on the rolls of a manor court of admissions of tenants in remainder after the determination of the

estate of the last tenant's widow, who held during her chaste viduity, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced. *Doe d. Askew v. Askew* . . . 366

COPYHOLD—4. Evidence of existence of manor.—An allegation in a declaration that one was seised of a manor of F., and that he and all those whose estate he has in the said manor have immemorially appointed a sexton of the parish of F., is sustained by proof of his seisin of a quondam manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane v. Ireland* . . . 285

— **5. Extinguishment.**—Copyhold premises, purchased by the lord, tenant for life of the manor, with remainders over, taking the surrender to him and his heirs, merge; and, as parcel, are subject to the limitations of the manor; and, though under a covenant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs, the mortgagee could compel a re-grant by the remainder-man, no re-grant having been made, the general devisees of the purchaser have no equity. *St. Paul v. Viscount Dudley and Ward* . . . 57

— **6. Right to work mines.**—Though the lord of a manor in Cornwall may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands, within the vill. *Curtis v. Daniel* . . . 291

— **7.** — The lord of a manor, as such, has no right, without a custom, to enter upon the copyhold within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing. *Bourne v. Taylor* . . . 267

— **8. Presumption of enfranchisement.**—The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the Crown. *Roe d. Johnson v. Ireland* . . . 504

— **9. Customary tenant by curtesy.**—A copyhold having descended to a wife as heir at law, who died before admittance; having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of England, according to the custom of the manor; though the only evidence of such custom on the Rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law. *Doe d. Milner v. Brightwen* . . . 395

And see Will, 10.

COPYRIGHT—Test of piracy by extracts.—An article in a general compilation of literature and science copies so much of a book, as to serve as a substitute for it. There was probably no intention to pirate it or to injure its sale. This is a violation of literary property, for which an action will lie to recover damages. *Roworth v. Wilkes* . . . 642

CORONER—Unnecessary inquest.—A mandamus to the justices in Sessions, to allow an item of charge in the coroner's account, refused; because the justices were of opinion under the circumstances, that there was

no ground to suppose that the deceased had died any other than a natural, though a sudden death, and therefore that the inquisition had not been duly taken. *R. v. The Justices of Kent* 484

COVENANT—1. **Accord and satisfaction.**—Accord and satisfaction made before breach of a covenant, cannot be pleaded in bar of an action on the covenant. *Kaye v. Waghorn* 558

— 2. **Running with land.**—Covenant upon a conveyance in fee with the grantors, lessees of water-works, not to sell or dispose of water from a well to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns.

The parties left to law, and a demurrer allowed from the inconvenience of enforcing such a covenant by injunction. *Collins v. Plumb* 214

CRIMINAL LAW—1. **Conspiracy**—**Motion for new trial.**—All the defendants convicted upon an indictment for a conspiracy (which has been removed by *certiorari* into the King's Bench) must be present in court when a motion for a new trial is made on behalf of any of them. *R. v. Teul* . 516

— 2. **Contract for expenses of prosecution.**—A security for the fair expenses of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor of ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 Geo. III. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced is legal. *Beeley v. Wingfield* 431

— 3. **Forgery**—**Evidence of prisoner's knowledge.**—Upon an indictment for uttering a forged bank note, knowing it to be forged; to shew the prisoner's knowledge of the note mentioned in the indictment being a forgery, evidence is admissible of his having a short time before uttered another forged bank note of the same manufacture, and of a number of others likewise of the same manufacture, with his hand-writing on the back of them, having been in circulation. *R. v. Ball* 695

CROWN—**Grant by.**—The words of a grant from the Crown, by contemporaneous exposition and constant usage, may be extended beyond their natural import, so as to confer a right to exercise an office within a city and the liberties thereof, granted only to be exercised within the city. *Mayor of London v. Long* 618

DEFAMATION.—1. **Imputation of publishing improper books.**—Although it is lawful for an author to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable falsely to impute to him the publication of any immoral or absurd literary production. *Tubart v. Tipper* 698

— 2. **Privileged communication.**—A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B. the writer of the letter was likewise interested, cannot be considered a libel, and made the subject of an action for damages. *M'Dougall v. Claridge* 679

DISTRESS—1. **Irregular.**—Where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterbourne v. Moryun* 532

DISTRESS—2. Wrongful detention. See Animals, 3.

EASEMENT—Way abutting on road.—A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted in the broadest part on the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road and the premises granted. Held that the grantor and those claiming from him were concluded from preventing the grantee to come out into the road over this slip of land. *Roberts v. Karr* 592

ECCLESIASTICAL LAW—Dilapidations—Where the rector's title to land is defective.—Where successive rectors had been in possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appearing that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 Geo. II. c. 36, and that no conveyance was enrolled according to the 1st section of that Act, nor any disposition of it made to any college, &c. according to the 4th section; held that no presumption could be made of any such conveyance enrolled (which if it existed the party might have shewn), and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed. *Wright v. Smythies* 337

EVIDENCE—1. Contents of missing letter.—When it is necessary to contradict a witness on the other side, as to the contents of a letter which has been destroyed, the witness may, after exhausting his memory in answer to a general question as to the contents of the letter, be asked specifically whether it contained a certain statement. *Courteen v. Touse* 627

— 2. Entry by person against his own interest.—If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death. And therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. *Higham v. Ridgway* 235

— 3. False return by sheriff—Evidence of bailiff.—In an action against the sheriff for a false return to a writ, what was said by the bailiff to whom the warrant under it was directed, when asked by the plaintiff's attorney before the return of the writ, why he did not execute it, is evidence against the sheriff. *North v. Miles* 710

— 4. I. O. U.—A written paper containing a bare acknowledgment of a debt is good evidence without a stamp. *Israel v. Israel* 737

— 5. In support of increased demand.—Although the plaintiff cannot give evidence beyond his particulars, yet if the defendant's evidence shews that there were other items, which he might have included in his demand, he is entitled to recover all that is due to him. *Hurst v. Watkins* 634

— 6. Of libel.—In an action for libel the defendant, under the plea of not guilty, may adduce evidence to shew that the supposed libel is a fair stricture upon the general run of works published by the plaintiff. *Tabart v. Tipper* 698

— 7. Admission through third person.—If A. refers B. for information upon a particular subject to C., what C. says concerning it, when applied to by B. or his agent, is evidence for B. in an action against A. *Williams v. Innes* 702

EVIDENCE—8. Of wife as to bastardy.—A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness; and therefore an order of Sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed. *R. v. The Inhabitants of Kea* 448

— 9. **Reference to documents in answers.**—If a witness examined upon interrogatories, refers to a writing itself not evidence, as containing a statement of the facts to which he is interrogated, this writing may be read as part of his deposition. *Falconer v. Hanson* 663

— 10. **Rent books.**—Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the Dean and Chapter of Exeter, intitled Rentals, and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different handwritings against such rents, were entries made by the receivers of the Dean and Chapter charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by showing that the receivers of the Dean and Chapter for the last sixty years had kept their books of accounts in the same form. *Doe, d. Webber, v. Lord George Thynne* 280

— 11. **Of custom.** See Copyhold, 3.

— 12. **Of existence of manor.** See Copyhold, 4.

— 13. **Of marriage in foreign country.** See Marriage, 1.

— 14. **Of fishery.** See Fishery.

And see Criminal Law, and Witness.

FISHERY—Evidence of right to.—To prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo* are evidence, without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery. *Rogers v. Allen* 689

FOREIGN JUDGMENT—Effect of.—The effect of a foreign judgment in this country is not to merge the original cause of action. The foreign judgment is evidence of the debt; but it is open to the parties to enquire into the regularity of the judgment. *Hall v. Odber* 443

FORGERY. See Bill of Exchange, 2.

FRAUD—Principal and agent.—Bill to set aside leases, obtained by an agent and attorney from his principal, dismissed as to voluntary leases; being pure gift; and no fraud or misrepresentation, or other unfair conduct. *Harris v. Tremeneere* 5

FRAUDS, STATUTE OF—1. Sale of growing crop.—A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground immediately; is not a contract for any interest in land within the 4th section of the Statute of Frauds. *Parker v. Stantland* 521

— 2. **Contract not to be performed within year.**—If it appear to have been the understanding of the parties to a contract at the time that it was not to be completed within a year, though it might and was in fact in part performed within that time, it is within the 4th clause of the Statute of Frauds, 29 Car. II. c. 3; and if not in writing, signed by the party to be charged, &c. it cannot be enforced against him. *Boydell v. Drummond* 450

FRAUDS, STATUTE OF—3. Connexion of documents.—Defendant's signature in a book intituled "Shakespeare subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the Boydell Shakespeare, cannot be connected with the prospectus, so as to take the case out of the statute, as such connexion could only be established by parol evidence. *Ibid* 450

And see Goods, sale of, 4.

FRIENDLY SOCIETY. See Bankruptcy, 2.

GOODS, SALE OF—1. Agent held out as principal.—If the owner of goods allows the broker through whom he sells them, to sell them as a principal, the purchaser of goods so sold is discharged by payment to the broker in any way which would have been sufficient, had he been the real owner. *Coates v. Lewes* 725

—2. Purchase by agent—Liability of undisclosed principal.—If goods are bought by a broker, who does not mention his principal until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor. *Waring v. Pavenck* 638

—3. Liability of principal for goods bought by broker.—If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he has previously paid the price of the goods to the broker. *Kymer v. Suwercropp* 646

—4. Auction—Statute of Frauds.—Where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognized the purchase. Held, that the entry in the catalogue, and the letter, coupled together, were a sufficient memorandum of the contract within the Statute of Frauds. *Phillimore v. Barry* 742

—5. Breach of excise regulations.—A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at Guernsey, of which a regular entry was made on importation, but without having entered himself with the excise office as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties. *Johnson v. Hudson* 465

—6. Factor's liability to account.—If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to re-deliver the residue unsold, on demand. *Topham v. Bruddick* 610

—7. Delivery.—Where turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent; and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house

officer to gauge them; but before he could fill up the rest a fire consumed the whole in the warehouse within the thirty days: held that the property passed to the buyers in all the casks which were filled up. But the property in the casks not filled up remained in the seller, at whose risk they continued. *Rugg v. Minett* 475

GOODS, SALE OF—8. Delivery.—If a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the Statute of Frauds. *Elmore v. Stone* 578

— 9. — If after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to a delivery of the goods to the purchaser, so as to put an end to the vendor's right of stopping them *in transitu*. *Hurry v. Mangles* 727

— 10. **Fraud upon buyer.**—The st. 17 Geo. III. c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them. *Law v. Hodson* 513

— 11. **Non-delivery—Wrongful seizure by government officials.**—If goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of Government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery, against the owner of the ship, who must seek his remedy over against the officers of Government. *Goelling v. Higgins* 726

— 12. **Order of several articles—Entire contract.**—If a person orders several articles from a tradesman, at the same time, though at distinct prices, he may consider the whole as forming one order, and he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accept of any one article, he is precluded from saying that the order was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract. *Champion v. Short* 631

— 13. **"Payment in one month, money."**—Goods sold by a broker for a principal not named, upon the terms, as specified in the usual Bought and Sold notes (delivered over to the respective parties by the broker) of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that by a bill of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. *Favenc v. Bennett* 425

— 14. **Quality not up to sample.**—In the sale of goods by sample, if the bulk does not accord with the sample, the purchaser is not bound to accept or pay for the goods on any terms. *Hibbert v. Shee* 649

— 15. **Stoppage in transitu.**—If A. sells goods to B. and according to B.'s directions sends them to C. a wharfinger, to be by him forwarded to B.; while they are in C.'s hands they may be stopped *in transitu* by A. *Smith v. Goss* 684

GOODS.—Supplied to wife—Action against husband for. *See Limitations, Statute of.*

GRANT.—By Crown. *See Crown.*

HEIR EXPECTANT.—Inadequacy of consideration.—In equity an expectant heir, dealing for his expectancy, is entitled to nearly as much protection as a person under an incapacity to contract.

Relief on payment of principal, interest, and costs; the purchaser being considered as a mortgagee. *Peacock v. Evans. Evans v. Peacock* . . . 218

HIGHWAY.—1. Dedication—Evidence of.—(a). Dedication of a street to the public may be presumed from eight years' uninterrupted user. *Rugby Charity v. Merryweather* . . . 528

(b.) If a passage leading from one part to another of a public street, made originally for private convenience, has been open for a great number of years, without any bar or chain across it, and without interruption, it is to be considered as dedicated to the public, and obstruction is indictable. *R. v. Lloyd* . . . 674

— 2. Obstruction.—One who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. *Butterfield v. Forrester* 433

— 3. Obstruction of. See *Rugby Charity v. Merryweather*, 528.

— 4. Repair of.—To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of G. B. &c.; and that the residue, &c. was within the township of L. B. &c. and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying what part of the highway lay within one township, and what part within the other. *R. v. The Inhabitants of the Parish of Bridekirk* . . . 514

HORSE. See *Animals*, 4.

HUSBAND AND WIFE—1. Husband's liability for goods supplied to wife.—Although a husband is not cohabiting with his wife, yet if she imprudently takes up goods of a tradesman, for which he would not otherwise be liable, he assents to the contract, if having any control over the goods, he does not cause them to be returned to the vendor. A husband is liable for necessities furnished to his wife suitable to the appearance in life he permits her to assume, though greatly beyond his degree or his circumstances. *Waithman v. Wakefield* . . . 654

— 2. Mortgage of wife's property—Husband's right to equity of redemption.—Husband and wife, seised under a settlement of the wife's property for their lives successively with remainders in strict settlement, and an ultimate remainder to the wife, in fee simple, subject to a joint power of revocation and new appointment having no issue, joined in a mortgage for a term of 1,000 years, and thereby covenanted to levy a fine to enure to the mortgagee during the term, and after the determination of the term to certain uses thereby declared with an ultimate use to the survivor of the husband and wife in fee simple. A fine was levied accordingly.

Held (on appeal) that the husband and his heirs, and not the heirs of the wife, were entitled to the equity of redemption. *Innes v. Jackson. Jackson v. Innes* . . . 190

INJUNCTION. See *Trespass*, 3, and *Waste*.

INQUEST, unnecessarily held. See *Coroner*.

INSURANCE (MARINE)—1. Right to abandon ship.—A ship insured from Jamaica to Liverpool was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment; and soon after receiving intelligence of the recapture, and that the ship was safe

in the possession of the recaptors, in a port in Ireland, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage, and arrived at Liverpool, and earned her freight: held that he was not entitled to abandon. *Buinbridge v. Neilson* 316

INSURANCE (MARINE)—2. **Abandonment of voyage.**—If a ship with goods on board insured to a foreign port, learning in the course of her voyage, that an embargo is there laid on all ships of her nation, waits at some place as near thereto as she safely can, till the embargo is removed, the goods will in the meantime be protected by the policy, while the voyage remains legal: But if she might, upon such an occasion, put into a friendly port adjoining to her port of destination, and instead of doing so, she sails back for her port of outfit, and is lost, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged. *Blackenhagen v. The London Assurance Company* 729

— 3. **Adjustment.**—An underwriter who, upon a full disclosure of facts, has signed his initials to an adjustment on the policy, without paying the loss, is not precluded afterwards, in an action against him, from taking advantage of circumstances, with which he had been made acquainted, before signing the adjustment. *Herbert v. Champion* 657

— 4. — An adjustment is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his attention was not then drawn to circumstances he afterwards learns, by which the underwriters were discharged. *Shepherd v. Chewter* 681

— 5. **Barratry of crew.**—If through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized as forfeited, the underwriters are not liable for the loss.

If a ship is justly seized as forfeited for smuggling, and afterwards restored, the underwriters are not liable for any damage happening to the ship by the perils of the sea, in the interval between the seizure and restoration. *Pipon v. Cope* 720

— 6. **Ship fired to avert capture.**—If the captain of a ship insured burns her, to prevent her from falling into the hands of the enemy, this is a loss by fire within the meaning of the policy. *Gordon v. Rimmington* . . . 656

— 7. **Concealment.**—If the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of insurance upon her, at and from a foreign port to a port in England; unless information on the subject be particularly called for. *Beckwith v. Sydebotham* 652

— 8. **Condemnation by foreign Admiralty Court.**—The sentence of a Court of Admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognized in our Courts; and that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority. *Donaldson v. Thompson* 717

— 9. **Deviation.**—A ship was by the course of the voyage to touch at Elsinore for convoy, and to pay the Sound dues: and the owner of sheep on board took in a short stock of provender for them at Stockholm, and laid in the rest at Elsinore before the Sound dues could be paid: held that the

voyage not being thereby delayed, though the occurrence was foreseen and intended, the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea. *Cormack v. Gladstone* 518

INSURANCE (MARINE)—10. Deviation.—If a ship has liberty to touch at a port, it is no deviation to take in merchandize during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there. *Urquhart v. Barnard* 574

— 11. — Leave granted in a policy of insurance on a fishing voyage to see prizes into port, does not authorize the ship to remain in port till a prize receives necessary repairs, which she could not otherwise have had; and at most extends to seeing the prize moored safely, and giving the necessary orders for her final destination. *Jarratt v. Ward* 677

— 12. Equipment of ship.—A ship, insured on condition of sailing with convoy, must (to be seaworthy) be properly equipped with sails so as to be able to keep up with convoy, as well as furnished with a sufficient crew. *Wedderburn v. Bell* 615

— 13. “Forwards and backwards at sea.”—A policy upon a homeward voyage from India, upon goods at and from a foreign port of loading, until the ship's arrival in London, beginning the adventure upon the said goods from the loading thereof at the foreign port of loading, and so should continue upon the goods, until the same should be discharged; was held to attach only on the particular cargo taken in at the first port of loading.

But upon an insurance on an Indian voyage out and home, the policy being equally extensive as that above stated, and containing the additional words, “and forwards and backwards at sea, until the ship's arrival at her last station of discharge,” though it purported literally to be on the said goods, the Court held it must by necessary implication apply to all goods put on board in the course of the voyage.

“Forwards and backwards” means from port to port in the course of the voyage, not from Europe to Asia and from Asia to Europe. *Grant v. Paxton* 583

— 14. Freedom from capture in port.—If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship while the vessel insured is lying in an open road, outside of a harbour, is not within the warranty. *Brown v. Tierney* 599

— 15. Increase of risk.—The underwriters on a policy of insurance are not discharged by an act on the part of the assured, which to a certain degree increases the risk, if it does not amount to culpable negligence. *Toulmin v. Inglis* 715

— 16. Insurable interest.—After a proclamation by the King in Council to detain and bring into port all Danish vessels, a hired armed ship of his Majesty took and carried into Lisbon a Danish vessel, and sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a Court of Admiralty, and afterwards took in a cargo on freight for England, and sailed from Lisbon; on the same day hostilities were declared against Denmark, after which an insurance was made on the ship and freight by order and on account of the captors. Held that the captors had no insurable interest, as they could claim nothing of right, but only *ex gratia* of the Crown. But held that the assured were entitled to recover back the premium, which had not been paid into court.

The King having subsequently, by order in council, adopted the insurance; held in a subsequent action by the same plaintiff averring interest in the King, that the plaintiff was entitled to recover as a trustee for his Majesty. *Routh v. Thompson*. 539

INSURANCE (MARINE)—17. *Insurable interest*.—A. residing in Dublin having agreed with B. and C. at Jamaica to send out two ships annually, for which they were to provide cargoes to be consigned to him, chartered a ship which was to proceed from Bristol to St. Thomas's, where she was to deliver an outward cargo (the property of another person), and from thence to Jamaica, where she was to take in a cargo from B. and C. for Dublin; and by the terms of the charter-party A., in consideration of guaranteeing the homeward cargo, was to receive a commission of $2\frac{1}{2}$ per cent. upon the homeward freight. The ship was captured on her passage from St. Thomas's to Jamaica. Held, that A. had not then an insurable interest either in the commission on the freight, or in the commission on the sale of the homeward cargo. *Knox v. Wood* 746

— 18. *Legality of voyage—Embargo*.—Freighters chartered a foreign ship to take a cargo from London to St. Petersburg, and to load a cargo there and immediately return to London, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at St. P. for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, the master should be at liberty to return to London, and the freighters should pay him 2,500*l.* immediately upon the arrival of the ship at London. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss in case the ship was not allowed to load a cargo at St. P. In fact the Russian Government, when the ship arrived at St. P. presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to London, and earned freight thereon. Held, 1. That the insurance was legal in the terms of it.

2. That the refusal of the Russian Government to permit the ship to unload her outward cargo, was, in effect, a refusal to allow her to load a cargo at St. P.; and that a total loss within the policy was incurred.

3. That the proceeding directly from St. P. to London was not a condition precedent to the master's right to recover from the freighters the dead freight of 2,500*l.* *Puller v. Staniforth* 486

— 19. *Loss of voyage—Fear of embargo*.—A British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a King's ship in the Baltic from an apprehension of hostilities for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy till the King's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull: held that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy. *Forster v. Christie* 470

— 20. *Neutral goods consigned to friendly port*.—Although a neutral should himself be resident in a hostile port, an insurance on goods (his property) consigned to a neutral or friendly port is valid. *Bromley v. Hesseltime* 635

— 21. *Representation*.—A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship, as to the time of her sailing, being made *bona fide* upon probable expectation, does not conclude him. *Bowden v. Vaughan* 340

INSURANCE (MARINE)—22. **Specific voyage—Necessary extension.**—A policy of insurance from Bristol to Monte Video, or other port in the River Plate, where the ship, after arriving off Maldonado at the mouth of the Plate, was immediately ordered off by the British commander there (the enemy having before got possession of every other port in the river), will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence in her way to Rio Janeiro, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs. *Parkin v. Tunno* 422

— 23. **Usage of trade.**—According to the usage of the Newfoundland trade, when ships arrive on the coast they are either employed for some time in fishing (called banking) or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy. Therefore, in effecting a policy, "lost or not lost at and from Newfoundland to a port in Europe," although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates. *Vallance v. Dewar* 738

INTERNATIONAL LAW.—A British subject voluntarily resident in an enemy's country, but naturalized by a neutral state, is an alien enemy for civil purposes notwithstanding such naturalization. *O'Meuley v. Wilson* 732

LANDLORD AND TENANT—1. **Breach of covenant—Plea of non-registration.**—A lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. II. c. 17, for want of being registered; such act, enacting that "no lease, &c. should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before. *Hodson v. Sharpe* 324

— 2. **Covenant—Proper and usual.**—Under an agreement for a lease the lessor is not without express stipulation entitled to a covenant, restraining alienation without licences, as a proper and usual covenant. *Church v. Brown* 74

— 3. **Covenant, illegal.**—A distinct covenant in a lease, whereby the tenant bound himself to pay the property-tax and all other taxes imposed on the premises or on the landlord in respect thereof, though void and illegal by the stat. 46 Geo. III. c. 65, s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell v. King* 462

— 4. **Notice to quit.**—A landlord of premises about to sell them gave his tenant notice to quit on the 11th of October, 1806, but promised him not to turn him out, unless they were sold: and not being sold till February, 1807, the tenant refused on demand to deliver up possession. On ejectment brought; held that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary. *Whiteacre d. Boulton v. Symonds* 224

— 5. **Recognition of tenancy.**—Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessor in possession under a void lease granted by tenant for life under a power, the rack rent value of which was 30*l.* a year, cannot maintain an ejectment, laying his demise, at least, on a

prior day, without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice. *Denn d. Brune v. Rawlins* 287

LANDLORD AND TENANT—6. *Lease granted under power*.—A lease, granted under a power directing the best rent to be reserved, cannot be impeached merely by shewing that the lessor rejected at the time two specific offers of higher rent from other tenants; though the responsibility of such other tenants could not be disproved. *Doe d. Lawton v. Radcliffe* 295

—7. *Ante-dated lease—Power*.—Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated in fact on the 17th of February, 1802, *habendum* from the 25th of March next ensuing the date thereof, is good if not executed and delivered till after the 25th of March; for it then takes effect as a lease in possession with reference back to the date actually expressed. *Doe d. Cox v. Day* 345

LEASE—For years or lives. *See Power; and Fraud.*

LIBEL. *See Defamation.*

LIEN. *See Solicitor, 3—5.*

LIGHT—Interference with.—An injunction against darkening ancient windows is not granted in every case that would support an action. The effect must be such material injury, amounting to nuisance, as should, upon equitable principles be prevented. *The Attorney-General v. Nichol* . . . 186

LIMITATIONS—Statute of.—Letter written by wife.—In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years, is admissible evidence to take the case out of the Statute of Limitations. *Gregory v. Parker* 712

MANDAMUS. *See Coroner.*

MANOR. *See Copyhold.*

MARKET—Toll.—Where the corporation of Worcester had for above forty years received toll upon corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held by the King's Bench sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer.

On the final judgment of the Court being brought up, in error, to the Exchequer Chamber, held that such prescription for toll on goods sold by sample in the market and afterwards brought into the city to be delivered, could not be supported. *Hill v. Smith* 357

MARRIAGE—1. *Evidence of*.—Evidence that British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the Church of England, and they received a certificate of the marriage, which was afterwards lost, is sufficient whereon to found a presumption (nothing appearing

to the contrary) that the marriage was duly celebrated according to the law of that county.

And such British subjects being attached at the time to the British army on service in such foreign country, and having military possession of the place, such marriage would be a good marriage by the law of England, as a marriage contract *per verba de presenti* before the Marriage Act; marriages beyond sea being excepted out of that Act. *R. v. The Inhabitants of Bampton* 299

MARRIAGE—2. Of illegitimate minor—Consent.—All marriages, whether of legitimate or illegitimate children, are within the general provisions of 26 Geo. II. c. 33, which requires all marriages to be by banns or licence; and a marriage of an illegitimate minor had by licence with the consent of her mother is void by the 11th section; the words father and mother in that section meaning legitimate parents. *Priestly v. Hughes*. 408

MARRIED WOMAN—1. Ante-nuptial debt.—A debt contracted by the wife before marriage survives (at common law) against her upon the death of her husband. *Woodman v. Chapman* 666

— 2. Separate estate—Bond.—Bond of a *feme covert*, as a surety, enforced against her separate estate, under a settlement to her separate use, with power of appointment by will. *Heatley v. Thomas* 122

MASTER—Authority of, to sell ship. See Ship and Shipping, 6.

MASTER AND SERVANT—1. Money paid to master for special services of servant.—If A. while employed as master of a ship, of which B. is the owner, gives part of his personal services to C. for a stipulated sum, and C. pays this into the hands of B., an action to recover it cannot be supported against B. at the suit of A. *Thompson v. Havelock* 744

— 2. Coach proprietor's liability for negligence of driver.—The proprietor of a stage coach is answerable for the negligence of the driver, from the usual place of taking up passengers, not only till the coach arrives at its place of destination, but till the passengers are there safely set down. The driver of a stage coach, before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger; and if he proceeds without giving them this information, the proprietor is liable for any injury they may thereby suffer, which they might have escaped by alighting. *Dudley v. Smith* 661

— 3. Seduction.—Damages *ultra* the mere loss of service having been given against the defendant for debauching and getting with child the adopted daughter and servant of the plaintiff, by which he lost her service, the Court refused to set aside the inquisition. *Irwin v. Deurman* 423

MINE—Right to work. See Copyhold, 6, 7.

MONEY PAID—Recovery of.—If an insurance broker, when a loss happens upon a policy which he has effected, pays the assured the full amount subscribed, he cannot recover back any part of it upon the ground that before the loss happened one of the underwriters upon the policy had become insolvent, and that he was not aware of this fact when he paid the money. *Edgar v. Bumstead* 713

NEGLIGENCE—1. Dock proprietor.—The proprietor of a dry dock is under a duty towards the owners of ships received in the dock to have a sufficient number of men on the premises to take precautions against danger such as the pressure of an unusually high tide. *Leck v. Maestaer* 660

— 2. Measure of damages.—In an action for negligence, whereby

the plaintiff's wife was killed he is not entitled to any damages for the loss of her society or assistance in business, or for his mental sufferings on her account, after the moment of her death. *Baker v. Bolton* . . . 734

NEGLIGENCE—3. Of driver. . See *Master and Servant*, 2.

PALACE—A sheriff may not execute process in.—A royal palace being kept in a constant state of preparation to receive the King is privileged against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of certain apartments therein. *Winter v. Miles* . . . 391

PARLIAMENTARY ELECTION—Candidate's liability for expenses.—A candidate at an election of members of Parliament is not liable for any part of the expenses of the election, except by positive statute or his own undertaking, notwithstanding a long usage for the expenses being rateably defrayed by the candidates. *Morris v. Burdett* . . . 667

PARTNERSHIP—1. Authority of partner to bind firm.—The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. *Lord Galloway v. Mathew* . . . 289

— 2. When firm bound by acts fraudulent as between partners.—Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties. *Bond v. Gibson* . . . 665

— 3. Insolvent partner has no authority to bind firm.—When a partner becomes bankrupt, all his authorities to bind the firm by dealings in the ordinary course of business, are deemed as having been determined by the act of bankruptcy. *Thomason v. Frere* . . . 341

— 4. Dissolution by bankruptcy of partner—Right of assignees to subsequent profits.—A partnership being dissolved by the bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bankruptcy. *Crawshaw v. Collins* . . . 61

— 5. Dissolution of.—Partnership without any provision as to its duration may be determined without previous notice; subject to the accounts, to wind up the concern. *Peacock v. Peacock* . . . 138

— 6. Misconduct of partner.—Partnership disputes. Alleged misconduct of managing partner. Motion for the appointment of a manager refused. *Waters v. Taylor* . . . 1

— 7. Partner competing with firm.—A partner must account for the profits of a business carried on by him in competition with the partnership business and in violation of the partnership agreement. *Somerville v. Mackay* . . . 200

PLEADING—Sham plea.—Where a sham plea was pleaded of judgment recovered in the Court of Piepoudre in Bartholomew Fair, in terms palpably fictitious and out of the regular course, the Court reprobatd the practice, and suffered the plaintiff to sign interlocutory judgment as for

want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings
Blewitt v. Marsden 284

And see Highway, 5.

POWER—Lease for years or lives.—An estate, the greater part of which was in lease, either for years certain not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. be reserved." Held, that the power only authorized either a chattel lease, not exceeding twenty-one years, or a freehold lease not exceeding three lives; and that a lease by tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, and was not even good *pro tanto* for the twenty-one years. *Roe d. Brune v. Prideaux* 258

PRACTICE—1. New trial.—The Court will not grant a new trial on account of a verdict being against evidence, where the damages to be recovered would not exceed five pounds. *Roberts v. Karr* 592

— **2. Irregularity in writ—Stay of proceedings.**—If the English notice at the foot of common process require the defendant to appear at a return day in an impossible year, it is not an irregularity for which the Court will set aside the proceedings. *Steel v. Campbell* 557

— **3. Writ served in wrong name.**—If a defendant be served with a writ by a wrong christian name of W., and do not appear to it, the plaintiff cannot file common bail for him in his right name of E., sued by the name of W., nor declare against him *de bene esse* in that form; and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea. *Dring v. Dickenson* 283

— **4. Writ sued out in wrong name.**—After a writ sued out, and common bail filed against a defendant by the name of J., it is irregular for the plaintiff to declare against him by the name of R., sued by the name of J. *Delanoy v. Cannon* 315

PRINCIPAL AND AGENT—1. Agent mixing principal's money with his own.—An agent, or bailiff, confounding his principal's property with his own, may be charged with the whole; except what he can prove to be his own. *Lupton v. White, White v. Lupton* 94

— **2. General authority implies usual course of business.**—An agent employed generally to do any act, is authorised to do it only in the usual way of business. Therefore as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bond fide*, and with a view to the benefit of his principal. *Wiltshire v. Sims* 673

And see Goods, Sale of.

PRIZE—Interest in.—No interest completely vested in prize before condemnation: but upon condemnation it is considered the property of the captor from the time of the capture. *Stevens v. Bagwell* 46

PROMISSORY NOTE—1. *Alteration*.—A promissory note for 100/. payable to the plaintiff or order, and originally expressed to be for value received generally, being altered the next day upon the suggestion of one of the parties, requires a new stamp; the words added being material, and not having been originally intended to be inserted and omitted by mistake. *Knill v. Williams* 349

— 2. *Unauthorized negociation*.—Holder for value.—Although the *bond fide* holder of a promissory note, made without consideration, himself gave a full consideration for it, yet if he took it after it was due from an indorser, who had been entrusted with it for a special purpose and without any right to negotiate it, he cannot maintain an action upon it against the maker. *Tinson v. Francis* 617

PUBLIC POLICY. See *Contract*, 1.

REGISTRATION—Of lease. See *Landlord and Tenant*, 1.

— Of ship. See *Ship and Shipping*, 8.

RESTRAINT OF MARRIAGE. See *Wager*.

SEDUCTION. See *Master and Servant*, 3.

SHERIFF. See *Evidence*, 3, and *Palace*.

SHIP AND SHIPPING—1. *Condition to sail direct*.—By a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board to sail with the first favourable wind direct to the port of Portsmouth. The ship however unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. In an action of *indebitatus assumpsit* for the freight, held, that the plaintiff's covenant to sail direct to Portsmouth was not a condition precedent; and that the deviation could not be given in evidence, either as a bar to the action, or to diminish the damages. *Bornmann v. Tooke* 707

— 2. *Destruction of vessel by fire*.—An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid till the ship's discharge, or return from her voyage, and the ship having sailed on a voyage to St. Domingo, where she arrived, but was burnt before her return; held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter, on which such extra allowance became payable. *Havelock v. Geddes* 380

— 3. *Freight*.—Sale of cargo.—The plaintiff agreed to let his ship to freight to the defendants on a voyage from Shields to Lisbon, with convoy; the freight to be paid on delivery of the cargo; the ship sailed from Shields and joined convoy at Portsmouth, and after being detained off Lymington, her sailing orders were recalled by the convoy, in consequence of the occupation of Portugal by the enemy. The defendants having refused to accept the cargo at Portsmouth, to which port the ship returned, it was unloaded by the plaintiff, after notice to the defendants, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight *pro rata* or demurrage. *Liddard v. Lopes*. 368

— 4. — *Unauthorized sale of cargo*.—Where in a charter-party freight was to be paid at so much per ton, on a right and true delivery of

the homeward-bound cargo, from Honduras Bay to London; and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting *bonâ fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the shipowners.—Held, that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight *pro rata itineris*. *Hunter v. Prinsep* 328

SHIP AND SHIPPING—5.—A covenant in a charter-party of affreightment that the owner shall at his expense forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages.

But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action.

The freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from four months to four months, and the ship were lost before the end of fourteen months. *Havelock v. Geddes* 380

— **6. Master's authority to sell ship—Powers of Vice-Admiralty Courts.**—The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be seaworthy. Nor does it appear that the master has any original authority to sell the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. *Reid v. Darby* 246

— **7. Master's liability for wrongful act of sailor.**—If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time.

The master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direction of a pilot, who, by the regulations of a statute, supersedes the master for the time in the government of his ship. *Boucher v. Noidstrom* 608

— **8. Property in—Registry.**—The registry of a ship is conclusive evidence of the property upon the policy of the Registry Acts; even against the claims of joint creditors, upon a joint purchase and various acts of apparent joint ownership. *Ex parte Yallop* 24

— **9. Sale of—Transfer of covenant.**—A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage: and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splidi v. Bowles* 296

— **10. Short cargo.**—Where the master and the freighter of a vessel mutually agreed in writing that the ship, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a complete cargo, and proceed therewith to London, and deliver the same on being paid freight at so much per ton: one half to be paid on right delivery,

the other at three months: held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. *Ritchie v. Atkinson* . . . 307

SHIP AND SHIPPING—11. — **Apprehension of hostilities.**—The master and the freighter of a vessel having mutually agreed in writing, that the ship should proceed to St. Petersburg, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same, on being paid freight, &c.; held that the master, after taking in at St. Petersburg about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian Government, was liable in damages to the freighter for the short delivery of the cargo; though he acted *bonâ fide*; and a hostile embargo and seizure was in fact laid on six weeks afterwards. *Atkinson v. Ritchie* 372

— 12. **Collision.** See **Trespass**, 1.

SOLICITOR—1. **Bill of costs.**—An attorney, not having delivered any bill to his client before action brought; but having delivered a bill of particulars of his demand under a Judge's order after action brought; is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of the stat. 2 Geo. II. c. 23, s. 23, requiring a bill to be delivered a month before the action brought. *Mowbray v. Fleming* 508

— 2. — Although an attorney shews his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is still bound to leave a copy of the bill with him, according to the provisions of stat. 2 Geo. II. c. 23, before he can maintain an action upon it. But where several are jointly liable to an attorney for business done, the delivery of a copy of the bill to one of them is sufficient to maintain a separate action against any of the others. Money paid by an attorney for costs which his client is adjudged to pay is a disbursement within 2 Geo. II. c. 23. *Crowder v. Shee* 722

— 3. **Lien.**—A solicitor has a general lien on papers in his possession; not limited, without special agreement, to the occasion on which such papers were delivered. *Ex parte Sterling* 177

— 4. — Solicitor's lien on papers superseded by taking security. *Cowell v. Simpson* 181

— 5. — Lien of the agent in town upon the papers in his hands for what was due to him, as agent in the cause, from the solicitor in the country. *Ward v. Hepple* 80

TENANTS IN COMMON. See **Waste**, 2.

TENDER—1. **Money must be produced.**—To make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. *Thomas v. Evans* 229

— 2. **To agent.**—A tender of money to an agent authorized to receive payment is a good tender to the creditor himself. *Goodland v. Blewith* 731

TIME—**Computation of.** See **Will**, 4.

TOLL—**Account stated.**—A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by statute, may recover the

amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* enclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of an account stated, and a recognition of the intestate's title to be accounted with for the tolls. *Peacock v. Harris* 231

TRESPASS—1. **Collision at sea.**—If the owner of a ship, being himself on board, and standing at the helm, unintentionally runs her against another ship, from unskilful management, the remedy is trespass and not case. *Covell v. Laming* 735

— 2. **Jus tertii.**—In trespass *quare clausum fregit*, the defendant cannot set up a *jus tertii* to rebut the mere possessory title of the plaintiff, unless he acted under the authority of such right. *Chambers v. Donaldson* 435

— 3. **Intending purchaser in possession.**—Injunction against cutting timber in the case of trespass by a person who had got possession under contract to purchase. *Crockford v. Alexander* 44

TRUST—1. **Power founded on personal confidence.**—A power to trustees based on personal confidence is *prima facie* limited to the original trustees, and does not pass to others who may subsequently fill the offices of trustee, unless an instruction to that effect is clearly expressed. *Cole v. Wade* 129

— 2. **Purchase in son's name.**—Purchase in the name of another a trust for the party who pays the consideration; except by a parent in the name of his child, which is presumed an advancement. The presumption is capable of being rebutted; but does not give way to slight circumstances. *Finch v. Finch* 12

VENDOR AND PURCHASER—1. **Purchaser in possession.**—Injunction against cutting timber. *Crockford v. Alexander* 44

— 2. **Specific performance.**—Injunction. —Injunction restraining vendor, defendant to a bill for specific performance, from conveying the legal estate. *Echcliff v. Baldwin* 178

— 3. — **Parol evidence.**—Parol evidence, in aid of a specific performance upon the sale of an estate by auction, to explain by declarations of the auctioneer an ambiguity on the face of the particular agreement, signed on the back of the particular, binding the purchaser, defendant, "to a strict fulfilment of this article, and to abide by the conditions and declarations made at the sale," rejected. *Higginson v. Clowes* 112

— 4. **Defect in title.**—A leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption: held that the purchaser was not bound to accept the title. *Barnwell v. Harris* 560

— 5. **Objection to title.**—**Purchaser in possession.**—Purchaser, having taken possession, but objecting to the title, required either to pay in the purchase-money or deliver up possession. *Clarke v. Wilson* 82

— 6. **Purchaser's objection to title.**—A purchaser is not precluded from insisting upon an objection to title, even though such objection appeared on the abstract, delivered before he filed his bill for specific performance. *Stapylton v. Scott* 179

— 7. **Specific performance.**—**Title.**—Reservation of salt works, mines, &c. in 1704, with a right of entry, though no instance of any claim. The

title had been transferred in 1761 without such reservation, upon the usual covenants. Held an objection, giving a right to compensation. *Seaman v. Paudrey* 207

VENDOR AND PURCHASER—8. Effect of possession as notice of title.—The possession of a tenant is notice to a purchaser (as between himself and the tenant) of the actual interest the tenant may have, either as tenant, or, as in this instance, under an agreement to purchase the premises. *Daniels v. Davison* 171

— 9. Vendor's lien.—A vendor has a lien for purchase-money unpaid against the vendee, volunteers, and purchasers with notice, or having equitable interests only, claiming under him; unless clearly relinquished; of which another security taken, and relied on, may be evidence. *Markreth v. Symmons* 85

— 10. Recovery of deposit.—A. as the agent of B. the owner of land, entered into an agreement for the sale of it with C., who appeared to act on his own account, but in fact was the agent of D., and A. and C. bound themselves in a penalty for the performance of the agreement, whereupon C. paid A. part of the purchase-money as a deposit. Held that upon a breach of the agreement D. might sue B. to recover back the deposit. *The Duke of Norfolk v. Worthy* 749

VICE-ADMIRALTY COURT—Powers of. *See Ship and Shipping*, 6.

WAGER—Restraint of marriage.—A wagering contract for fifty guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void. *Hurtley v. Rice* 228

WARRANTY—Breach of. *See Animals*, 4.

WASTE—1. Equitable—Ornamental trees.—Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees, planted for the purpose of excluding objects from view. *Day v. Merry* 200

— 2. Tenants in common.—Injunction against waste between tenants in common, on the ground that one was occupying tenant to the other: otherwise not, except as to destruction. Equitable waste by cutting trees, planted for ornament. *Twort v. Twort* 141

And see Trespass, 3; *and Will*, 20.

WILL—1. "At her disposal afterwards to leave it to whom she pleases."—One devises all his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases;" held that this only gave her a power to leave it by will; and therefore that a disposition of it by feoffment in her lifetime was void. *Doe d. Thorley v. Thorley* 352

— 2. Charity.—Trust by will to pay the income to the testator's wife for life; enjoining her to co-operate with his trustees in carrying his wishes into execution; and directing her with the advice and assistance of his trustees to lay out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife shall judge most worthy and deserving objects; giving a preference always to poor relations. The object is charity in general; with a preference, but not confined to poor relations: the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the control, of the trustees. *Waldo v. Caley* 165

WILL— 3. "Children."—Residuary bequest to A. "in case she should have legitimate children; in failure of which" to go over.

A. having only one child born alive, who died before her, entitled absolutely. *Wall v. Tomlinson* 212

— 4. **Condition—Computation of time.**—Bequest of residue, in trust, in case A. shall within six calendar months after the testator's decease give security not to marry B. then, and not otherwise, to pay to the children of A.; with a proviso to go over, if she shall refuse or neglect to give such security. A condition precedent. The six months are exclusive of the day of the testator's death. *Lester v. Garland* 68

— 5. **Conversion.**—Where a conversion of land is directed for the general purposes of a will, and some of those purposes fail, yet the conversion being effectual, the surplus proceeds result to the heir at law as personal estate. But where a conversion of land is directed by will for a particular purpose only (i.e. payment of debts), all that is not required for that purpose results to the heir at law as land, as if the conversion had completely failed. *Wright v. Wright* 161

— 6. **Direction to pay another's debts.**—Charge by will on real estate of simple contract debts of another person considered as a legacy, carrying interest from the death of the testator at 4 per cent. *Shirt v. Westby* 210

— 7. **Estate tail.**—Devise to A. and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughters, and to their heirs male for ever. An estate in tail male in A. *Wight v. Leigh* 120

— 8. — Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife and the overplus to his nephews; and after his wife's death to the use of his nephews and the survivor for their lives; remainder, to the use of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee. Held that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe d. Terry v. Collier* 529

— 9. **Gift over.**—Legacy in trust to pay the interest to the separate use of A. for life; and, after her decease, as to the capital for her children: if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons. Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established. *Pearsall v. Simpson* 1

— 10. **Gift to a class.**—Bequest of the produce of the sale of a copyhold estate to A. the wife of B. for life; and after her death to divide the principal among the children of B. and C. equally; and of the testator's reversionary interest in Bank Stock on the death of D. if in his name at his decease, and if not, at D.'s death, equally among the same children. Vested interests in all the children; comprising those who died, and those who came into existence after the death of the testator, and during the lives of the tenants for life. *Walker v. Shore* 41

— 11. **Joint tenants.**—Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as executors, but as devisees in trust and joint tenants. *Denne d. Bowyer v. Judge* 511

WILL—12. Life interest.—A trust for A. and his heirs to pay him the interest for life and advance any part of the principal for him, and a gift over of the residue, confers a life interest on A. *Robinson v. Cleator* 118

— 13. **Married woman.**—Probate of the will of a married woman, limited to her power, by the assent of her husband, with respect to any beneficial interest. *Stevens v. Bagwell* 46

— 14. **"Of my name and blood."**—Devise to the devisor's sister A., then unmarried, for life; with remainders to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail: remainder to the first and nearest of his kindred being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body. A person, claiming under the last limitation, must be of the name, as well as the blood; and the qualification as to the name is not satisfied by having the name, taken by the King's licence, previous to the determination of the preceding estates. *Leigh v. Leigh* 31

— 15. **"Other effects (money excepted)."**—A residuary bequest in general terms. Revocation by a codicil as to "plate linen household goods and other effects (money excepted)." The exception prevents the restrained construction, in general, of the words "other effects": viz. *ejusdem generis*: stock therefore, which does not pass under the word "money," was included, with leasehold and all personal property, except money and Bank notes. *Hotham v. Sutton* 83

— 16. **"Payable."**—Trust by will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces, equally at twenty-one; with survivorship in case any should die, before his or their shares should become payable; and a limitation over, in case all should die, &c. Vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax v. Wilson* 146

— 17. **"Personal estates."**—Real property may pass under the description of "personal estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the devisor's intention. *Doe d. Tofteld v. Tofteld* 496

— 18. **Portion—Satisfaction.**—Though generally a satisfaction by will of a portion must be of the same nature, and equally certain, a bequest of a share in powder-works, to be made up in value 10,000*l.*, charged with an annuity of 20*l.* for a life, was held a satisfaction of a portion of 2,000*l.* *Bengough v. Walker* 106

— 19. **Power to renew lives.**—Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock, including, as to six of the estates, three several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make three in like manner, as after mentioned, for other persons to do the same;" and then giving this general power, "that when and so often as the lives on either of the estates before given shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or estates to renew the same with the person or persons to whom the revenue thereof shall belong by adding a third life in such estate, and paying such reverser two years' purchase for such renewal; and also to exchange either of the said two lives on payment of one year's purchase:" Held that this power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe d. Hardwicke v. Hardwicke* 375

WILL—20. **Tenant for life—Waste.**—Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively without impeachment of waste. The trustees laid out part of the fund in an estate with a considerable quantity of timber upon it. The first tenant for life cannot cut the whole. *Burges v. Lamb* 150

WITNESS—Absence of.—If a witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an English port by contrary winds, just at the time of the trial. *Ward v. Wells* 581

WORDS—1. “At her disposal afterwards to leave it to whom she pleases.” *See Will, 1.*

— 2. “Children.” *See Will, 3.*

— 3. “Forwards and backwards at sea.” *See Insurance (Marine), 13.*

— 4. “Of my name and blood.” *See Will, 14.*

— 5. “Other effects (money excepted).” *See Will, 15.*


— 6. “Payable.” *See Will, 16.*

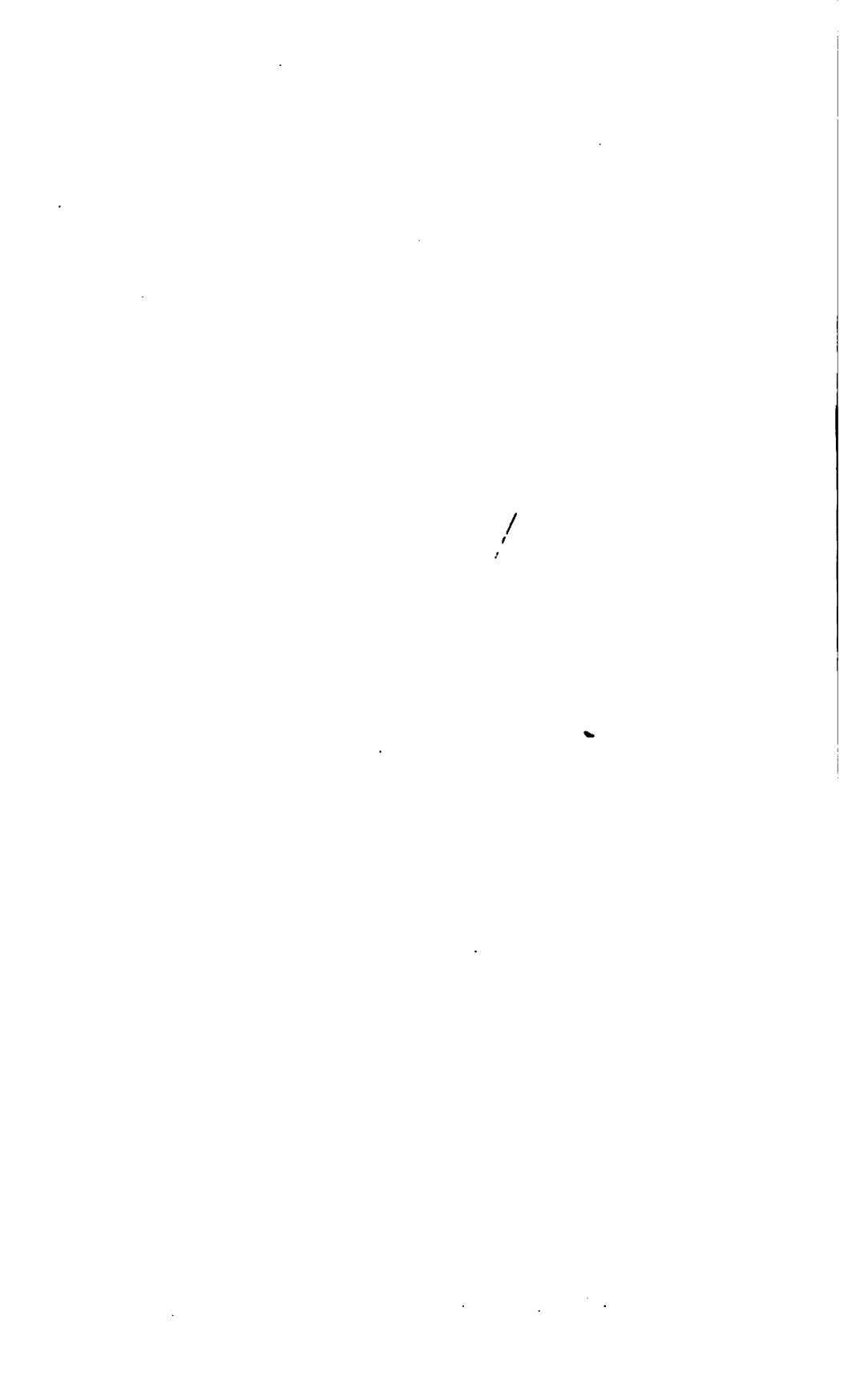
— 7. “Personal estates.” *See Will, 17.*

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.. See Will, 17.





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